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FEDERAL COMMUNICATIONS COMMISSION

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FCC 74-614

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re APPLICATIONS FOR CONSENT TO VOLUNTARY TRANSFER OF CONTROL OF 11 STATIONS IN THE CABLE TELEVISION RELAY SERVICE FROM ATHENA COMMUNICATIONS CORPORATION, TO TELE-COMMUNICATIONS, INC.	Files Nos. CTC-71, CTC-72, CTC-73

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 20, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. On November 30, 1973, the Commission gave public notice of an application [1] for the Commission's consent to a transfer of control [2] from Athena Communications Corporation to Tele-Communications, Inc., of the following Cable Television Relay Service (CARS) stations:

Corpus Christi, Texas, WJT-43 (CTC-71)
Near Port Lavaco, Texas, WSF-20 (CTC-71)
Near Tivoli, Texas, WSF-21 (CTC-71)
Near Rufugio, Texas, WSF-22 (CTC-71)
Near Sinton, Texas, WSF-23 (CTC-71)
Near Oakland, California, WPW-34 (CTC-72)
Near Slater, Missouri, KOU-57 (CTC-73)
Near Fayette, Missouri, KOU-58 (CTC-73)
Near Columbia, Missouri, KOU-59 (CTC-73)
Fulton, Missouri, KOU-60 (CTC-73)
Bratton Farm, Missouri, KOU-62 (CTC-73)

The application was filed by proposed transferee, Tele-Communications, Inc. The proposed transferor, Athena Communications Corpora-

[1] TCI's pleading was accepted as an "informal application" as contemplated by Section 1.531(a) of the Commission's Rules. Section 1.531(a) of the Rules provides as follows:

(a) "Formal application" means any request for authorization where an FCC Form for such request is prescribed. "Informal application" means all other requests for authorization. Informal applications may be in letter form, but all such applications should contain a caption clearly indicating the nature of the request submitted therein.

[2] Relevant Section 310(b) of the Communications Act of 1934, as amended, provides as follows:

(b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

tion, is the current licensee or permittee of each of the above-listed CARS stations through its subsidiaries, Athena Cable Corporation of Corpus Christi, Inc. (CTC–71), Bay Cablevision, Inc. (CTC–72), and International Telemeter, Inc. (CTC–73). TCI is already a CARS licensee (WKJ–25) and is the holding company of Community-Tele-Communications, Inc., a cable television operating subsidiary, and Western Tele-Communications, Inc., a microwave common carrier operating subsidiary. TCI also controls the following cable television operating subsidiaries: Centre Video Corporation; Community TCI of Ohio, Inc.; Com-West, Inc.; Nation Wide Cablevision, Inc.; and TCI Pacifica Corporation.

2. In its application TCI states that—pursuant to an August 1, 1973, agreement with Gulf and Western Industries, Inc.—it acquired 358,348 shares of Athena common stock, 200,000 shares of Athena $6.00 cumulative preferred stock, and warrants to purchase an additional 600,000 shares of Athena common stock. TCI states its understanding that its recently acquired stock constitutes approximately 17.9% of Athena's outstanding common stock; 82.1% is owned by the public or the officers and employees of Gulf and Western. By exercising its warrants, however, TCI states that it could achieve ownership of approximately 36% of Athena's outstanding common stock which could give TCI control of Athena. Following the acquisition of the above-mentioned stock and warrants, TCI explains, Dr. John C. Malone, President of TCI, and Donne F. Fisher, Treasurer of TCI, were elected to Athena's five-person Board of Directors. Dr. Malone now serves as Board Chairman. While the other members of the Athena Board of Directors (as well as Athena's officers) are the same as before TCI's acquisition, TCI acknowledges that it has offered to Athena a general management contract which is subject to approval by Athena's Board of Directors and that it eventually will attempt to elect a third director to the Athena Board.

3. TCI's stated intention thus is to achieve operating control of Athena by exercising its warrants, electing a third TCI representative to the Board of Directors, or both. Its application seeks Commission consent under Section 310(b) of the Communications Act of 1934, as amended, to its proposed acquisition of operating control. In support of its application, TCI maintains that its qualifications to be a licensee or permittee of non-broadcast radio facilities have been considered previously and approved by the Commission—e.g., its status as licensee of CARS Station WKJ–25 (CTC–14; CLCAR–165). Athena supports TCI's request for commission consent to transfer.

4. On January 16, 1974, the Community Coalition for Media Change filed a "Petition to Deny Transfer." CCMC is a public interest group representing citizens residing in the service area of an Athena Cable Television subsidiary, Bay Cablevision. It submits that the application, as it relates to Bay Cablevision (CTC–72) should be denied, dismissed as defective, or designated for hearing with CCMC allowed to intervene in the proceeding. CCMC maintains that TCI has not documented to the Commission, with regard to Bay Cablevision's Berkeley, California system, its compliance with the franchise standards of Section 76.31 of the Commission's Rules. CCMC further asserts that Bay Cablevision is "in violation of the Commission[s] [R]ules" by its al-

leged failure "on at least two occasions" to have a "public file" available for scrutiny during business hours. Additionally, CCMC argues that Bay Cablevision, proposed transferor Athena, and proposed transferee TCI, have failed to meet the equal employment opportunity standards of Section 76.311 of the Commission's Rules. CCMC notes that no Black or Spanish speaking persons hold official or managerial positions at Bay Cablevision and that no Blacks are on the Board of Directors at either Athena or TCI.[3] It further maintains that Bay Cablevision "has no actual program, *other than on paper*, to upgrade present Blacks and Spanish speaking to be sure that Blacks and Spanish speaking are represented at all levels . . . " In conclusion, CCMC asks that the Commission investigate ". . . the hiring practices of all the subsidiary cable systems, as well as the headquarters staff of both Athena Communications Corporation and Tele-Communications, Inc., and determine whether Blacks and Spanish-speaking persons are being discriminated against."

5. On February 6, 1973, TCI filed a "Motion to Strike and Motion to Dismiss" directed against CCMC's "Petition to Deny Transfer." TCI argues, *inter alia*, that CCMC's petition is invalid because it (a) was not timely filed,[4] (b) lacks an affidavit supporting factual allegations,[5] (c) does not demonstrate that grant of the application would be inconsistent with the public interest, convenience and necessity, and (d) does not demonstrate that CCMC is a party in interest.

6. We note that the objections of CCMC were not filed within the time period specified by Section 78.22(a) of the Commission's Rules [6] (even CCMC's request for extension of time was not timely filed): however, pursuant to Section 78.22(c) of the Rules,[7] we shall consider their merits. And we believe that CCMC's interest in the matter is sufficient to establish standing under Section 78.22(c). However, we must deny the petition. Contrary to CCMC's assumption, the Commission's franchise standards in Section 76.31 of the Rules are not applicable to the case before us. Though Athena's ownership structure has changed, its franchise has not. Athena apparently is still the franchisee under local law, and the Commission's cable television rules do not presently require a new "public proceeding affording due process." However,

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[3] With respect to Athena this apparently is no longer the case. It has come to the Commission's attention (*CATV Magazine*, May 13, 1974), that Judge W. Otis Higgs was recently elected to serve on Athena's Board of Directors.

[4] In its request for extension of time, filed January 2, 1974 (more than 30 days after the subject application's placement on public notice), CCMC asked "that the time for filing its objection" be extended to January 15, 1974. CCMC's "Petition to Deny Transfer," dated January 14, 1974, was not received at the Commission until January 16, 1974.

[5] We note that CCMC's "Affidavit," attested to on January 19, 1974, was received at the Commission on January 24, 1974.

[6] Section 78.22(a) of the Rules states as follows: "Any party in interest may file a petition to deny any application (whether as originally filed or as amended no later than thirty (30) days after issuance of a public notice of the acceptance for filing of any such application or amendment thereto. Petitions to deny shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof."

[7] Section 78.22(c) of the Rules states as follows: "Notwithstanding the provisions of paragraph (a) of this section, before Commission action on any application for an instrument of authorization, other than a license to cover a construction permit, any person may file informal objections to the grant. Such objections may be submitted in letter form (without extra copies) and shall be signed by the objector. The limitation on pleadings and time for filing pleadings provided for in Section 1.45 of this chapter shall not be applicable to any objections duly filed pursuant to this paragraph."

as recently noted, we now have this issue under study. Pars. 80–83, *Clarification of the Cable Television Rules and Notice of Proposed Rule Making and Inquiry*, FCC 74–384, 46 FCC 2d 175. CCMC also has failed to document its position that Bay Cablevision, Athena and TCI have been lacking in their hiring practices. Lastly, Bay Cablevision's alleged failure to maintain a "public file" is irrelevant to the proceeding before us. The Commission's Rules do not require a cable television system, or its owner, to place on public file an application for transfer of control. Additionally, we note that any information which Bay Cablevision is obliged to make available for public inspection, while relevant to Athena's operation, is irrelevant to our examination of TCI's qualifications to hold the subject permits and licenses (see in this connection the *Notice of Proposed Rule Making in Docket No. 19948*, FCC 74–207, 45 FCC 2d 669, which contemplates, *inter alia*, the broadening of these public inspection obligations).

7. Before we can reach a conclusion as to the merit of the proposed transfer of control, however, we must address one further point. On January 30, 1974, the Commission's staff sent applicant's counsel a letter which noted that (a) the predicted Grade B contour of Station WRDW–TV, Augusta, Georgia, whose licensee, Rust Craft Broadcasting Co., holds approximately three percent of the voting stock of TCI, apparently covers in whole or in part Richland County and Lexington County, South Carolina, (b) Athena controls certain cable television operations in these South Carolina counties, and (c) the proposed transfer of control from Athena to TCI thus apparently would create a new cross-ownership prohibited by Section 76.501 of the Commission's Rules.[8] On March 1, 1974, TCI submitted its response. According to TCI's data, Palmetto Cablevision, which Athena controls and which now operates the cable systems in Richland and Lexington Counties, plans to expand its 3,700 subscriber operations and hopes to pass approximately 40,000 homes by the systems' completion in 1975. The Palmetto systems surround the City of Columbia, South Carolina, which is located approximately 65 miles northeast of Augusta. The predicted Grade B contour of Station WRDW–TV extends approximately five miles beyond the City of Columbia. Four television stations (three network affiliates and one educational station) as well as seven AM and five FM aural facilities are licensed to communities in either Lexington County or Richland County. In view of the above and in light of the fact that Rust Craft owns far less than a controlling interest in TCI or Palmetto[9] TCI seeks a temporary waiver of Section 76.501 of the Rules. Additionally, TCI cites Rust Craft's previously filed petition (CSR–376(X)), which seeks a temporary waiver with respect to existing cross-ownership between Rust Craft Station WSTV–TV, Steubenville, Ohio, and a number of cable television systems operated by TCI within that station's predicted

[8] § 76.501 Cross-ownership.
(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in: * * *
(2) A television broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

[9] TCI submits that Rust Craft's indirect interest in Palmetto represents approximately 0.61%.

Grade B contour. In this petition Rust Craft states that (a) its ownership interest in TCI is *de minimis*, (b) permission to retain ownership in TCI until August 10, 1980, will avoid the financial hardship which would likely result from a forced sale of TCI stock at its current market value, (c) Rust Craft's only representative on the TCI Board of Directors will resign from the position, assuming his re-election in the future, on or before August 10, 1975, and (d) Rust Craft is willing to place its TCI holdings in a voting trust should the Commission deem it necessary.

8. In view of (a) Rust Craft's stated intention to come into compliance with Section 76.501 of the Rules, (b) the location of Palmetto's systems at the fringe of Station WRDW–TV's predicted Grade B service area, (c) the multiplicity of media voices available in the systems' service areas, and (d) Rust Craft's relatively small holdings in TCI and in the Palmetto cable operations, the Commission believes that it is consistent with the public interest to grant a temporary waiver of Section 76.501 with respect to the subject TCI-Athena broadcast-cable cross-ownership. We waive Section 76.501 only during the pendency of Rust Craft's petition for waiver (CSR–376(X)), which will decide the more general issue of Rust Craft's ownership interests in TCI. This cross-ownership is merely the incidental by-product of an attempt to merge the two larger entities. It seems unlikely that a temporary waiver will significantly detract from the purposes of Section 76.501.

9. The subject application for Commission consent to transfer of control of eleven CARS stations represents, of course, a larger transaction. It reflects, in essence, a merger of the third (TCI) and 18th (Athena) largest multiple system owners in the country. They now serve approximately 440,000 and 92,700 subscribers respectively. Other than the *de minimis* Palmetto situation, the proposed merger apparently will not result in any cross-ownership prohibited by Section 76.501 of the Rules. Furthermore, TCI has sufficiently demonstrated that it is qualified to be the permittee or licensee of the subject CARS stations, and that its future control of Athena's other cable operations will not be inconsistent with the public interest, convenience and necessity. In view of all the foregoing, the Commission is satisfied that grant of the subject applications will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the "Petition to Deny Transfer" filed by the Community Coalition for Media Change IS DENIED.

IT IS FURTHER ORDERED, That Section 76.501 of the Commission's Rules IS WAIVED to the extent indicated above.

IT IS FURTHER ORDERED, That the above-captioned applications (CTC–71, CTC–72, CTC–73) ARE GRANTED in accordance with authorizations to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

FCC 74-673

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of BELO BROADCASTING CORP. (WFAA-TV), DALLAS, TEX. For Renewal of Broadcast License	Docket No. 19744 File No. BRCT-33
WADECO, INC., DALLAS, TEX. For Construction Permit for New Television Broadcast Station	Docket No. 19745 File No. BPCT-4453

MEMORANDUM OPINION AND ORDER

(Adopted June 26, 1974; Released June 28, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND QUELLO ABSTAINING FROM VOTING.

1. The Commission has before it for consideration (1) WADECO, Inc.'s petition for reconsideration, (2) an opposition by Belo Broadcasting Corporation, (3) the "Comments" of the Chief, Broadcast Bureau, (4) Belo's opposition to the Bureau's comments, and (5) WADECO's reply to the Belo opposition.

2. The applications of WADECO and Belo (WFAA-TV) are mutually exclusive and therefore were designated for comparative hearing by Order of May 24, 1973, 40 FCC 2d 1131. WADECO appealed from that Order to the United States Court of Appeals for the District of Columbia Circuit, Case No. 73-1673. It argued that the Order deprived WADECO of a "full comparative hearing," as required by *Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F.2d 1201 (1971), and *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). This argument had not been made before the Commission, so while the case was still pending before the Court we sought a dismissal without prejudice in order that WADECO could petition for reconsideration.[1] By Order of March 28, 1974, the Court remanded the record to the Commission while retaining jurisdiction of the appeal. It ordered that "the petition for reconsideration be filed promptly; and that the proceedings thereon be completed, and the record as supplemented thereby by retransmitted to this Court within a period of ninety (90) days from the date of this order . . . ."

3. We have decided to modify our designation order in this proceeding, for the reasons set forth below in our conclusions.

BACKGROUND

4. The present controversy arose out of an application for *pro forma* assignment of the WFAA-TV license. The application was

[1] Section 1.106(a)(1) of the Commission's Rules, 47 C.F.R. 1.106(a)(1) normally precludes reconsideration of a designation order.

filed 21 months after the renewal application but prior to designation. WADECO objected to grant of the assignment on the ground that Belo's comparative position with respect to integration of ownership with management would be improved. WADECO acknowledged that the Commission's rules freely permit pre-designation amendments to broadcast applications, Section 1.522, 47 C.F.R. 1.522, but asserted that in this instance delay in designating these applications for hearing should have barred Belo from improving its comparative position.

5. On May 23, 1973, the Commission granted the Belo assignment application. In letters advising the parties of the action (*Beaumont Television Corporation*, 41 FCC 2d 245 and 41 FCC 2d 251), the Commission stated that WADECO would not be prejudiced by any improvement in Belo's integration posture because "a renewal applicant such as WFAA–TV is judged in this area solely on its past performance, and not its integration of ownership and management." 41 FCC 2d at 246 and 251. WADECO did not seek reconsideration of or appeal from the grant of assignment.

6. On the same day, the Commission designated the above-captioned mutually exclusive applications for comparative hearing. In doing so the Commission referred to WADECO's objections to the WFAA–TV assignment:

> A dispute also arose in this case concerning possible changes in the integration of ownership and management picture of station WFAA–TV. This dispute has caused us to focus on the relationship between past record and integration of ownership and management in the evaluation of the renewal applicant. See letter to Mr. Thomas M. P. Christensen, FCC 73–545. As we made clear, WFAA–TV as a renewal applicant is judged solely on its past record—not its integration. Whether that record warrants a "plus of major significance" (*Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F.2d 1201, decided June 11, 1971) is of crucial importance in the judgmental process. As the Court there noted, the incumbent licensee with such a "plus" can normally expect renewal in any comparative challenge. In short, in the case of the renewal applicant there is no need to rely upon presumptions (e.g., integration, local residence) as to how the applicant will perform in this critical area of serving the needs and interests of his area—that whether his integration is zero or 100%, the actual past performance speaks for itself and is the factor to be considered in the evaluation of the renewal applicant in this respect. *A.H. Belo Corp.*, 40 FCC 2d 1131, 1133 (1973).

THE PRESENT PLEADINGS

7. In its petition for reconsideration, WADECO argues that the full comparative hearing mandated by Section 309(e) of the Communications Act, 47 U.S.C. 309(e), requires comparison on the basis of integration and diversification of control of mass media; that in past cases the Commission has consistently compared applicants on the basis of those factors; that in filing its application WADECO relied upon such past precedent; and that the above-quoted language from

the designation order denies WADECO its right to a full comparative hearing. In support, WADECO points out that *Johnston Broadcasting Co.* v. *FCC*, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949), requires comparison of all relevant criteria, and that the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), treats integration as a factor of substantial importance. While WADECO acknowledges that the 1965 Policy Statement was not intended to apply to comparative renewal hearings, it cites *Citizens Communications Center* v. *FCC*, *supra*, for the proposition "that the Communications Act itself places the incumbent in the same position as an initial applicant." WADECO also observes that in all the comparative renewal cases decided since 1965 the Commission compared the applicants on the basis of integration, citing *WHDH, Inc.*, 16 FCC 2d 1, reconsideration denied, 17 FCC 2d 856 (1969), and *Moline Television Corp.*, 31 FCC 2d 263 (1971). It points specifically to *WHDH* where the Commission held that integration was an important criterion even though one of the applicants is a renewal applicant with an operating record. 17 FCC 2d at 860.[2]

8. In addition, WADECO takes issue with the designation order's reliance upon past performance, arguing that the Commission should follow the 1965 Policy Statement and consider only past performance which is outside the bounds of average, i.e., either unusually good or unusually bad, since average future performance is expected. WADECO does recognize that under *Citizens Communications Center* superior past performance is entitled to a "plus of major significance," but asserts that the Court never intended to immunize the renewal applicant from comparison on other factors, regardless of the level of past performance. *Moline*, *supra*, is cited as an instance where the Commission considered integration even though the renewal applicant's past performance was found to be superior. In conclusion, WADECO contends that the 1965 Policy Statement should apply to comparative renewal hearings, and that the designation order should "be amended to specify that WADECO will have the benefit of a full comparative hearing and that evidence will be taken on all relevant comparative criteria."

9. In its opposition, Belo asserts that the only purpose of paragraph 6 of the designation order quoted above "was to reassure WADECO that it would not be adversely affected because its position under the integration criterion had been worsened by the Commission's action on the [WFAA–TV assignment]." Since the paragraph has apparently failed in that purpose, Belo suggests that the language could be deleted as unnecessary. Nevertheless, Belo argues that paragraph 6 is "neither illegal nor improper."

10. Belo observes at the outset that despite paragraph 6, the Commission's designation order specifies the standard comparative issue, "2. To determine which of the proposals would better serve the public interest," 40 FCC 2d at 1133, and that the Commission never suggested "that it would disregard or fail to give appropriate weight to any integration showing by WADECO." Belo then traces Commis-

[2] WADECO also notes that on petition for clarification of *Citizens Communications Center* the Court suggested that the integration of minority groups into the station's operation would be a relevant comparative criterion. 149 U.S. App. D.C. 419, 463 F.2d 822 (1972).

sion precedent beginning with *Hearst Radio, Inc.* (*WBAL*), 15 FCC 1149 (1951), to show that integration has been used principally to determine the likelihood of effectuation of proposals; that a past record of operation is a more reliable indicator than integration of future performance; and that although the Commission has compared competing applicants in a comparative renewal hearing on the basis of integration, it has, as in *Moline*, *supra*, judged renewal applicants primarily on the basis of past broadcast record. 31 FCC 2d at 269.

11. Belo further argues that to apply the 1965 Policy Statement to comparative renewal hearings "would be to defy reason, as well as precedent." It notes that 1965 Policy Statement was limited to hearings between new applicants, and that therefore any discussion of past broadcast record must refer to operation of an entirely different station. On the other hand, in dealing with a license renewal applicant, it has always been recognized that past performance "must be the fundamental basis for any projection of its likely future efforts." *RKO General, Inc.* (*WNAC–TV*), 35 FCC 2d 100, 103 (1972). See also *Office of Communications of United Church of Christ* v. *FCC*, 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966). With respect to the *Citizens Communications Center* case, Belo argues that the Court "merely require[d] the Commission to adhere to the comparative hearing procedure which it has followed without fail since *Ashbacker*," and that *Ashbacker*, "which turned on the difference between an applicant for initial authorization and an applicant for renewal of license, . . . precludes the treatment of incumbent licensees and newcomers as though they were the same." [3]

12. WADECO's reply to the Belo opposition agrees that past performance should be considered in a comparative renewal hearing, but not to the exclusion of the "standard comparative criteria." It argues that to say that WADECO's integration will be considered "begs the question," since what is required is a comparison of the applicants on the basis of comparable criteria. Finally, it points out that since the filing of the petition for reconsideration, the Commission has released designation orders in two comparative renewal cases, *Columbia Broadcasting System, Inc.* (*WCAU–TV*), FCC 74–363, and *Post-Newsweek Stations of Florida, Inc.* (*WPLG–TV*), FCC 74–362, neither of which limited the comparative showing as was done here.

CONCLUSIONS

13. The narrow issue before us is whether WADECO's application for construction permit should be compared with Belo's renewal application on the basis of integration of ownership with management and local residence, but in a broader sense the petition for reconsideration

[3] In its comments, the Broadcast Bureau supports WADECO's position, chiefly on the basis of past Commission precedent. It notes that in *WHDH, Moline*, and the recently decided *RKO General, Inc.* (*KHJ–TV*), 44 FCC 2d 123 (1973), the Commission considered integration and diversification. Further, the Bureau contends that while a renewal applicant with a superior record can reasonably be assured of renewal, "a renewal applicant whose record is less than superior must be compared in some manner to the challenger and Commission precedents would seem to indicate that criteria such as integration and diversification may then be considered." In response, Belo argues that *KHJ–TV*, like *Moline*, was decided on the renewal applicant's past performance: that it would be error to rely on presumptive factors like integration and ignore a more reliable factor such as past performance; and that even if the Bureau's interpretation of Commission precedent is persuasive, the Commission is not bound by the rule of *stare decisis*.

addresses our overall policy governing comparative renewal proceedings. After consideration of the above summarized pleadings, we have decided that the legal and policy issues attendant to that policy cannot be thoroughly explored in the limited context of a designation order. Nor do we believe it appropriate to consider individual factors on an *ad hoc*, piecemeal basis.[4] Moreover, we note that renewal legislation is now pending in the United States Senate. Under consideration is a bill passed by the House of Representatives which would amend Section 307(d) of the Communications Act, 47 U.S.C. 307(d), to preclude the Commission from considering either integration or diversification in reviewing a broadcast license renewal application. In view of this pending legislation, we believe it would be impracticable at this time to change our course of proceeding in pending comparative renewal hearings.

14. Accordingly, we will continue to adhere to our past line of precedent in this hearing and apply the 1965 Policy Statement to the introduction of evidence. However, what we said in *Seven (7) League Productions, Inc.* (*WIII*), 1 FCC 2d 1597 (1965), still applies: "we wish to make it clear that the parties will be free to urge any arguments they may deem appropriate concerning the relative weight to be afforded the evidence bearing on the various comparative factors." 1 FCC 2d 1597, 1599. We will, therefore, delete paragraph 6 from the designation order, and retain the standard comparative issue as originally specified.[5]

15. We should point out, however, that in past comparative evaluations of renewal applicants, the Commission has given primary weight to past performance; and from the days of the Federal Radio Commission the courts have concurred in that judgment. See, *e.g.*, *KFKB Broadcasting Ass'n.*, v. *FCC*, 60 App. D.C. 79, 81, 47 F. 2d 670, 672 (1930); *Office of Communications of United Church of Christ* v. *FCC*, 123 U.S. App. D.C. 328, 341, 359 F. 2d 994, 1007 (1966); and *Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 39, 447 F. 2d 1201, 1208 (1971). Our decision here does not alter the importance of a renewal applicant's past record of performance as the most reliable indicator of future performance.

16. In view of the foregoing, however, IT IS ORDERED That, to the extent indicated above, WADECO's petition for reconsideration is GRANTED, and IT IS FURTHER ORDERED That paragraph 6 of our Order in *A. H. Belo Corp.*, 40 FCC 2d 1131, 1133 (1973), is hereby DELETED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[4] In this regard, there is now before the Commission a rulemaking proceeding (Docket 19154) looking toward the establishment of guidelines for superior performance. *Broadcast Renewal Applicant*, 27 FCC 2d 580 (1971), and *Broadcast Renewal Applicant*, 31 FCC 2d 443 (1971). Many of the parties filing in that proceeding have addressed themselves to the applicability of the 1965 Policy Statement criteria.

[5] With regard to the effect to be given the WFAA–TV assignment, we note that Section 1.522 of the Commission's Rules, 47 C.F.R. 1.522, permits amendments as a matter of right prior to designation. Here the assignment was granted prior to designation, so any amendment filed to reflect the assignment should be permitted. WADECO, in requesting that the Commission compare the applicants on the basis of integration, has not renewed its objection to the amendment, and we note that WADECO took advantage of Section 1.522 to file 23 amendments, the last of which was filed only 14 days prior to adoption of the designation order.

FCC 74-646

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CABLE ANTENNA SYSTEMS, TRAVIS AIR FORCE BASE, SOLANO COUNTY, CALIF. For Certificate of Compliance	CAC-1903 (CA368)

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 26, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. Cable Antenna Systems has filed an application for a certificate of compliance to commence cable television service at Travis Air Force Base, located within the San Francisco-Oakland-San Jose, California, television market (#7). Cable Antenna proposes carriage of the following television broadcast signals: [1]

KTVU (Ind., Channel 2), Oakland, California
KCRA-TV (NBC, Channel 3), Sacramento, California
KVIE (Educ., Channel 6), Sacramento, California
KXTV (CBS, Channel 10), Sacramento, California
KMUV-TV (C.P., Channel 31), Sacramento, California
KTXL (Ind., Channel 40), Sacramento, California
KOVR (ABC, Channel 13), Stockton, California
KNTV (ABC, Channel 11), San Jose, California
KGSC-TV (Ind., Channel 36), San Jose, California
KTEH (Educ., Channel 54), San Jose, California
KFTY (Ind., Channel 50), Santa Rosa, California
KCSM-TV (Educ., Channel 14), San Mateo, California
KLOC-TV (Ind., Channel 19), Modesto, California
KRON-TV (NBC, Channel 4), San Francisco, California
KPIX (CBS, Channel 5), San Francisco, California
KGO-TV (ABC, Channel 7), San Francisco, California
KQED (Educ., Channel 9), San Francisco, California
KEMO-TV (Ind., Channel 20), San Francisco, California
KQEC (Educ., Channel 32), San Francisco, California
KBHK-TV (Ind., Channel 44), San Francisco, California

Objections to Cable Antenna's application have been filed by Central California Educational Television, licensee of Television Broadcast Station KVIE (Educ., Channel 6) Sacramento, California, the City of Fairfield, California, the Fairfield-Suisun Unified School District, and Storer Cable TV, Inc., operator of a cable television system at

[1] The franchise specifies that the system will have a 48-channel capacity. Section 76.251(a)(2) of our Rules requires this system to have at least a 40-channel capacity. The present state of the art suggests that a 48-channel requirement is reasonable.

Fairfield, California, and Cable Antenna has replied. In addition, the Department of the Air Force has filed a "Statement of Position". The system's carriage proposal is consistent with the Commission's Rules.

2. In its objection, Storer argues that because Travis Air Force Base was annexed by the City of Fairfield in 1966, it is subject to Fairfield jurisdiction. Fairfield's Cable Television Ordinance No. 69–29, adopted in 1969, as amended by Ordinance No. 70–18, requires cable television systems operating in the City of Fairfield to obtain a City franchise, and, therefore, Storer argues, Commission certification must be denied until applicant obtains a valid municipal franchise. Storer maintains that although Travis is admittedly a unique type of community and it is unquestioned that any cable system serving Travis must obtain Air Force approval, Travis is also legally inseparable from the City and in such case two authorizations are necessary. Storer also maintains that military procurement regulations cannot properly govern the franchising of a private cable television system if nonappropriated fund activities such as officer's clubs etc., will subscribe to the system.[2] Moreover, Storer claims that operation of a cable television system on Travis Air Force Base without a Fairfield franchise, which mandates a 5 percent franchise fee, is discriminatory against other Fairfield cable television systems that must so operate;[3] and that the obtaining of lower subscriber charges for on-base residents through the avoidance of local franchise fees is not a "military function." Additionally, Storer states that this proposal raises the dangerous specter of a tall tower being constructed on a major air field, since applicant proposes to import distant signals without the aid of microwave relay. Finally, Storer argues that the application must be denied because the Air Force awarded the franchise to Cable Antenna Systems pursuant to Air Force Regulation 70–3, using a sealed bid procedure, and, accordingly, the franchisee's qualifications and construction arrangements were not considered in a public proceeding as required by Section 76.31(a) of the Commission's Rules.

3. Central California objects to Cable Antenna's application on the grounds that it is not in the public interest to carry the distant signals of Educational Television Broadcast Stations KTEH and KCSM–TV, and such carriage would damage KVIE's support in the area. The City of Fairfield has objected on the basis that because it annexed the base, it has jurisdiction over a cable system operating on the base, and not obtaining a city franchise is illegal. It is also urged that the City has an important interest in an integrated cable communications system in all parts of the county. Fairfield-Suisun Unified School District argues that two separate systems serving the area and its schools would not provide for future expansion as well as one system.

4. The Department of the Air Force has submitted a "Statement of Position" which argues that the federal government has exclusive

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[2] "Nonappropriated funds are assets held by nonappropriated fund instrumentalities of the United States, the source of which is separate and distinct from appropriations by the Congress. They are generated by Air Force people (and others for whom Air Force commands have support responsibilities) through their participation in MWR (morale, welfare, and recreation) activities and are administered and expended by NAFI's (nonappropriated fund instrumentalities). Those assets are controlled by the Air Force and are, in fact, Government funds." Air Force Regulation 34–3, Volume 2, Paragraph 1–2, February 15, 1974.

[3] We note Storer is the only system serving Fairfield, and it is an unsuccessful bidder for the Travis franchise.

jurisdiction over the principal portion of Travis AFB, and, although the State of California may have concurrent jurisdiction over later-acquired portions, the Department of the Air Force is the appropriate franchising authority for the Travis system. In addition, the Department states that the franchise standards prescribed by AFR 70–3 satisfy the requirements of Section 76.31(a)(1) of the Rules because "contracting officers are under explicit instructions to publicize as broadly as possible the Air Force's decision to obtain the services of a private CATV system on an Air Force base, in order to elicit the maximum response from the public and thus to maximize competition for the franchise."

5. With respect to Storer's and the City of Fairfield's objections, the question of jurisdiction over the various tracts used by Travis Air Force Base is a federal question. *Paul* v. *United States*, 371 U.S. 245, 267 (1963). It is not within the purview of this Commission to decide to what extent, if any, the City of Fairfield has jurisdiction over the use of the streets and ways of Travis Air Force Base. It is, however, not disputed that the Air Force has the right to grant an authorization for a cable system on the base. We shall accept such authority unless directed otherwise by an appropriate court.

6. We presume the correctness of the Air Force's interpretation of its enabling statutes and regulations regarding appropriated and non-appropriated fund activities. In any event, this Commission is not the appropriate forum for resolving a dispute of this nature. Therefore, we will accept this franchising agreement as valid, subject to any subsequent contrary judicial determination. With respect to the argument that it is in some way unfair that the applicant will not have to pay a franchise fee, it is enough to note that we have not made franchise fees mandatory. Therefore, if a particular franchising authority elects not to impose one, we will honor that choice.

7. As to the arguments of Storer and the City of Fairfield that the Franchise Agreement is inconsistent with Section 76.31(a)(1), we find that because of the unusual nature of military operations, it is appropriate to waive the requirements of Section 76.31(a)(1) and (4) of our Rules requiring an appropriate public proceeding in the examination of franchise bidders' qualifications and requiring an appropriate public proceeding before subscriber rates may be increased. We note that special considerations have led Congress to establish the armed forces procurement statute [4] which avoids public proceedings in the award of contracts for services.

8. We rule that, as to Cablevision's technical proposal and its potential for causing an air hazard, the franchising authority has the primary responsibility for approval of applicant's technical qualifications to serve the base. In addition, the Commission's Rules contain a comprehensive set of technical requirements which must be observed. In the absence of any inconsistency with these requirements and in the absence of any special showing to the contrary, we must assume that the proposed system will not in fact pose any hazards. As to the possible creation of an air hazard by construction of a tall

[4] Chapter 137 of Title 10, U.S. Code, as implemented by the Armed Services Procurement Regulation.

tower, clearly the Federal Aviation Authority is the appropriate authority over such matters.

9. With respect to Central California's assertion that the proposed importation of KTEH and KCSM–TV will have an undesirable impact on KVIE's stability, we note that no probative factual financial data or other showings have been offered to support this allegation. Without such a showing, we must deny this objection as merely speculative. *See Fort Smith TV Cable Co.*, 39 FCC 2d 573 (1973).

10. We find that the Fairfield-Suisun school district's allegations that future expansion of the area and its schools will be better served by one cable system rather than two are purely speculative and have not been supported by any corroborative data. This objection, too, will be denied.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Application" filed by Storer Cable TV, Inc., directed against Cable Antenna Systems' application, IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Application" filed by the City of Fairfield, directed against Cable Antenna Systems' application, IS DENIED.

IT IS FURTHER ORDERED, That the objection of Fairfield-Suisun Unified School District, directed against Cable Antenna Systems' application, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Carriage and Request for Special Relief" filed by Central California Educational Television, directed against Cable Antenna Systems' application, IS DENIED.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–1903), filed by Cable Antenna Systems, IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-640

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CARLSBAD CABLE TV, INC., CARLSBAD, CALIF. For Certificate of Compliance	CAC-1829 CA564

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 27, 1974)

BY THE COMMISSION:

1. Carlsbad Cable TV, Inc., has filed the above-captioned application to commence cable television service at Carlsbad, in San Diego County, California. Carlsbad is a community of approximately 14,944 persons, located within the San Diego, California, major television market (#51). Carlsbad Cable's system will be constructed with 24 channels and proposes to offer its subscribers the following television broadcast signals:

KCST (ABC, Channel 39), San Diego, California
KFMB-TV (CBS, Channel 8), San Diego, California
KOGO-TV (NBC, Channel 10), San Diego, California
KPBS-TV (Educ., Channel 15), San Diego, California
XEWT-TV (Span. Lang., Channel 12), Tijuana, Mexico
XETV (Ind., Channel 6), Tijuana, Mexico
KCET (Educ., Channel 28), Los Angeles, California
KABC-TV (ABC, Channel 7), Los Angeles, California
KCOP (Ind., Channel 13), Los Angeles, California
KHJ-TV (Ind., Channel 9), Los Angeles, California
KMEX-TV (Span. Lang., Channel 34), Los Angeles, California
KNBC (NBC, Channel 4), Los Angeles, California
KNXT (CBS, Channel 2), Los Angeles, California
KTLA (Ind., Channel 5), Los Angeles, California
KTTV (Ind., Channel 11), Los Angeles, California
KWHT-TV (Ind., Channel 22), Los Angeles, California
KBSC (Ind., Channel 52), Corona, California
KLXA-TV (Ind., Channel 40), Fontana, California
KHOF-TV (Ind., Channel 30), San Bernardino, California

On September 5, 1972, the City of Carlsbad annexed several surrounding communities, including Ranchos La Costa, wherein is located the La Costa Community Antenna System. La Costa commenced operation in July, 1965, and is grandfathered to carry all the above-listed Los Angeles stations (except Station KLXA-TV and KHOF-TV). The City of Carlsbad has agreed to continue La Costa's rights to serve Ranchos La Costa and therefore, pursuant to Section 76.65, any system commencing operations in Carlsbad is grandfathered to carry the same Los Angeles signals, presuming that the annexed area is

interpreted as part of the Carlsbad community and not separate and distinct. Carlsbad Cable has submitted with its application a "Temporary License Agreement" granted October 19, 1972, which expires October 19, 1974. Carlsbad Cable has also submitted an access proposal inconsistent with Commission Rules, and a waiver is being sought.[1] The application is opposed by Western Telecasters, Inc., licensee of Television Broadcast Station KCST, San Diego, California; Midwest Television, Inc., licensee of Station KFMB–TV, San Diego, California; and McGraw-Hill Broadcasting Company, Inc., licensee of Station KGTV, San Diego, California.

2. On February 21, 1973, KCST filed an "Objection to Application for Certificate of Compliance and Petition for Special Relief" asserting that the importation of the "grandfathered" Los Angeles signals will have an adverse economic impact upon local San Diego television stations. KCST urges that special relief should be granted prohibiting the importation of these signals. In support thereof, KCST has requested that the Commission consider the evidence it has submitted in oppositions to every application for certification for cable television systems in San Diego County, California.[2] In the alternative, KCST argues that the "grandfathered" status of these signals being claimed by Carlsbad Cable is inconsistent with Commission Rules because Ranchos La Costa is a "separate and distinct" community from the City of Carlsbad, regardless of the annexation because they are not contiguous. KCST is joined in this argument by Stations KFMB–TV and KGTV, although KFMB–TV has filed only a partial opposition seeking to prevent carriage of the "grandfathered" Los Angeles signals and not denial of the entire application. KGTV's opposition also asserts that Carlsbad Cable's application should be denied because the "franchise" granted Carlsbad Cable is inconsistent with the franchise standards of Section 76.31 of the Commission's Rules. It argues that the Carlsbad City Council granted a "Temporary License Agreement" merely to allow construction contractors or developers to put in cable systems for the purpose of selling the systems to whoever subsequently obtained a franchise. KGTV asserts that the Carlsbad "Temporary License" by its own terms states that this license "constitutes no precedent as regards any CATV franchise the city may ultimately issue and is meant as an interim measure while the city is studying and considering a regular CATV franchise form and franchise policy." KGTV's opposition further asserts that Carlsbad Cable has failed to demonstrate the requisite need for a waiver of the access channel requirements of the Commission's Rules and to support its waiver request by a proper affidavit.

3. In response to KCST's special relief petition, Carlsbad Cable argues that its application for certification is a matter independent from consideration of applications in other areas in San Diego County, and that KCST has presented no evidence in support of the special re-

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[1] In its waiver request, Carlsbad Cable states that "Due to the economic limitations as well as the limited size of the cable TV system, Carlsbad proposes to initially provide for the carriage of television broadcast signals and automated program originations only. As soon as Carlsbad is successful in obtaining a permanent franchise, implementation of the Commission's required access channels will be undertaken."

[2] Western has filed consolidated objections and petitions for special relief against 17 applications for certificates of compliance in San Diego County, California. These oppositions were accompanied by a detailed economic analysis of the effect of the importation of Los Angeles signals into San Diego County.

lief requested. In response to the oppositions regarding the grandfathered status of signals carried on a Carlsbad community cable television system, the applicant asserts that Ranchos La Costa is now a part of the Carlsbad community and is not a "separate and distinct" community. Therefore, Carlsbad Cable asserts that it is entitled to any grandfather rights for signals already grandfathered to the cable television system in Ranchos La Costa. In support thereof, Carlsbad Cable argues that determinations of community are purely local matters and that although the pre-annexed Carlsbad community and the annexed area of Ranchos La Costa are not physically contiguous that it was the decision of the Carlsbad and the Ranchos La Costa citizens to become part of the same community and this "purely local determination" should not be "second guessed" by the Commission. Moreover, applicant asserts that Carlsbad and Ranchos La Costa have shared the same post office since 1965 and, pursuant to the recent annexation, will share all municipal services, except fire departments. In addition, the residents of La Costa are obligated to pay Carlsbad community taxes. Accordingly, Carlsbad Cable asserts that for the Commission to deny its proposed carriage of the "grandfathered" Los Angeles signals would be neglecting the "competitive realities" [3] of two systems attempting to operate viable cable television systems in the same community.

4. In reply to KGTV's argument that the Temporary License Agreement is not consistent with the rules, Carlsbad Cable argues that their "franchise" is an "other appropriate authorization" contemplated by Section 76.31 of the Rules. The applicant asserts that this "other appropriate authorization" fully recites and contains the requirements of Section 76.31 as evidenced by the showing in its application for certification. Carlsbad Cable argues that the Commission's regulatory program of "dual jurisdiction" establishes a local government's authority "to determine local needs and the most efficient means in the use of the streets and rights of way." Carlsbad Cable does not dispute the opposition contention that the temporary license was awarded to allow contractors and developers to begin construction and operation of a system "to be permanently licensed to that builder or some other bidder(s) to whom the city will award a franchise(s) in accordance with the provisions of the Commission's Cable Television Service Rules and Regulations."

5. In reply to McGraw's argument that insufficient need for a waiver of the access requirements of Section 76.251 of the Rules has been shown, Carlsbad Cable explains that it is seeking only a temporary waiver until a permanent franchise is granted, at which time it pledges full compliance with Commission Rules. Applicant argues that this short time period is "de minimis" and that an obligation to commence access programming at this time would be economically burdensome.

6. In *Mission Cable TV, Inc.*, FCC 73-395, 40 FCC 2d 705 (1973), the Commission fully considered the evidence put forth by KCST and concluded that it had not made the required showing that the importation of certain Los Angeles signals into San Diego County would lead to a net loss of television service to the public. Moreover, although Carlsbad and La Costa are separated by an airport and small pockets of undeveloped land, the evidence shows that they are about two miles

[3] *See Twin County Trans Video*, 6 FCC 2d 575 (1967); *Kar-Mel CATV Systems, Inc.*, 10 FCC 2d 961 (1967).

109-000—74——2

apart, that they share municipal services and obligations and that La Costa was not singled out for annnexation. We emphasize (contrary to the applicant's contention) that it is the Commission's appropriate role to determine if the annexed area of La Costa is a part of the Carlsbad community as contemplated by the Commission's Rules. Although we do recognize certain local prerogatives in making these determinations,[4] it is necessary for the Commission to scrutinize such annexations to determine whether an area has been annexed solely for the purpose of circumventing our Rules. In this case, our examination convinces us that La Costa should not be treated as a separate and distinct community from the pre-annexation Carlsbad community.

7. The Commission believes the "franchise" submitted with Carlsbad Cable's application is inconsistent with Commission Rules. The Commission did not contemplate the award of temporary licenses as "other appropriate authorization" but rather anticipated circumstances where no franchising authority existed (i.e., unincorporated areas) or unique situations where a franchise *per se* could not be awarded. Further, the temporary license awarded the applicant is clearly not compliant with Section 76.31 of the Rules. Although the application indicates that the applicant's qualifications were considered, no evidence has been submitted to show that a "full public proceeding affording due process" required by Section 76.31(a)(1) of the Rules was held. In addition, the temporary license fails to set forth the initial subscriber rates which will be charged and fails to indicate that any increase in rates must be approved by the franchising authority "after an appropriate public proceeding affording due process" as required by Section 76.31(a)(4) of the Rules. The applicant's assurance that all required procedures will be adhered to during the permanent franchise awarding process is of no consequence concerning the award of the temporary license. Moreover, the applicant's access channel waiver request reinforces our decision to deny this application on the basis of its temporary license agreement. The applicant asserts that the brief period of authorization granted by its temporary license would make it economically impractical to furnish the required access facilities and programming until a "permanent" franchise is awarded. It should be noted that this is one of the reasons why such an authorization is not what the Commission contemplated as "other appropriate authorization."

In view of the foregoing, the Commission finds that a denial of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Partial Opposition to Application for Certification" filed February 28, 1973, by Midwest Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance and Petition for Special Relief" filed February 21, 1973, by Western Telecasters, Inc., IS DENIED.

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[4] In a recent Commission decision, *Cablecom-General, Inc.*, FCC 74-426, 46 FCC 2d —— (1974), the Commission had to determine whether two "pockets" which are not contiguous would have to be treated as separate communities for application of our access requirements. In permitting one access facility for these non-contiguous areas, the Commission was influenced by the franchising authorities' decision to treat the separate pockets as one area, emphasizing the consideration given to the determinations of local authorities. *Compare* para. 66, *Clarification of Rules and Notice of Proposed Rulemaking*, FCC 74-384, 46 FCC 2d 175 (1974).

IT IS FURTHER ORDERED, That the "Opposition to Application for Certification" filed February 28, 1973, by McGraw-Hill Broadcasting Company, Inc., IS DENIED in part and GRANTED in part.

IT IS FURTHER ORDERED, That the above-captioned application, filed January 16, 1973, by Carlsbad Cable TV, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-641

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CATV OF ROCKFORD, INC., ROCKFORD, ILL. For Certificate of Compliance	CAC-2695 IL108

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 26, 1974)

BY THE COMMISSION: CHAIRMAN WILEY ABSTAINING FROM VOTING; COMMISSIONER REID CONCURRING IN THE RESULT.

1. CATV of Rockford, Inc., operates a cable television system at Rockford, Illinois, a community located within the Rockford-Freeport, Illinois, major television market (#97), and has been certified by the Commission [1] to serve its subscribers with the following television broadcast signals: [2]

WCEE-TV (CBS, Channel 23), Freeport, Illinois
WREX-TV (ABC, Channel 13), Rockford, Illinois
WTVO (NBC, Channel 17), Rockford, Illinois
WGN-TV (Ind., Channel 9), Chicago, Illinois
WFLD-TV (Ind., Channel 32), Chicago, Illinois
WXXW (Educ., Channel 20), Chicago, Illinois
WTTW (Educ., Channel 11), Chicago, Illinois

CATV of Rockford has filed an application for certificate of compliance, seeking authorization to carry Station WHA-TV (Educ., Channel 21), Madison, Wisconsin. The application was subsequently amended to seek authorization to substitute the signal of Station WSNS-TV (Ind., Channel 44), Chicago, Illinois, for that of Station WFLD-TV (Ind., Channel 32), Chicago, Illinois. The proposed carriage is consistent with Section 76.63 of the Rules.

2. Although the application is unopposed, Metro Cable Company, operator of cable television systems at North Park, Loves Park, and unincorporated areas of Winnebago County, Illinois, has filed a letter advising that CATV of Rockford has commenced carriage of Station WHA-TV without the requisite certificate of compliance, and, furthermore, has used its public access channel for television guide and cable promotion purposes. Metro Cable notes that it, too, has pending applications for certificates of compliance to add an educational signal

[1] The cable system was granted a certificate of compliance on November 9, 1972. *CATV of Rockford, Inc.*, FCC 72-1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73-293, 40 FCC 2d at 493 (1973).

[2] The community of Rockford has a population of approximately 150,000. The cable system currently has 30 channels available for carriage of broadcast and access services. Of these channels, seven are used for television signal carriage, and the remainder are available for automated and access services.

to its systems but has not commenced carriage since its applications have not yet been granted.[3] It states that the conduct of CATV of Rockford constitutes an undue competitive advantage.

3. In reply, CATV of Rockford states (a) that on November 9, 1972, it was authorized by the Commission to carry, *intra alia*, the signal of Television Broadcast Station WXXW (Educ., Channel 20), Chicago, Illinois, but that because of a request by the educational authority of the City of Rockford,[4] the cable system applied to the Commission on June 8, 1973, for a certificate of compliance to carry Station WHA–TV (Educ., Channel 21), Madison, Wisconsin, instead;[5] (b) that on June 12, 1973, without Commission authorization, CATV of Rockford commenced carriage of WHA–TV instead of WXXW; (c) that this action was taken in an effort to assist the local educational authority; (d) that while the action taken did not comply with the letter of the Rules, it complied with the spirit; (e) that the interest in WHA–TV is evidenced by the number of schools using the station's programming in their curriculums; and (f) that, in any case, CATV of Rockford and Metro Cable are not in competition since they serve different communities. Finally, CATV of Rockford states that it has "wholly terminated its temporary practice of carrying any information on the channel designated for 'public access' purposes on the system."

4. CATV of Rockford's explanation does not justify its commencing carriage of WHA–TV in violation of our Rules. Although cable systems within the predicted Grade B contour of an educational television station are no longer required to obtain Commission certification prior to carriage of such stations,[6] unauthorized carriage of WHA–TV commenced fully five months prior to adoption of this rule change. While we encourage cable systems to cooperate with local educational authorities in developing carriage and service packages, such cooperation may not operate in contravention of our Rules.[7] Despite this improper conduct, we do not believe the public interest would be served by a denial of the instant application. It is our policy to encourage the

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[3] Metro Cable's application for Loves Park was granted by the Chief, Cable Television Bureau, pursuant to delegated authority, on August 30, 1973.

[4] The authority is composed of representatives of the public school district, the local junior college, one private college, two parochial organizations, an independent private school organization, the State Department of Education, the local library, and the Rockford Arts and Cultural Council.

[5] Station WHA–TV places a predicted Grade B contour over the City of Rockford.

[6] On November 21, 1973, the Commission amended Section 76.11 of the Rules to read as follows:

§ 76.11 *Certificate of Compliance required.*

(a) No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission: *Provided, however,* That an existing system may add a television signal, pursuant to §§ 76.57(a)(1)–(3), 76.59(a)(1)–(3) and (5), 76.61(a)(1)–(3), or 76.63(a) (as it relates to § 76.61(a)(1)–(3)), or the signal of a noncommercial educational television station that is operated by an agency of the state within which the system is located, pursuant to §§ 76.57(b), 76.59(c), 76.61(d), of 76.63(a) (as it relates to § 76.61(d)), without filing an application or receiving a certificate of compliance, if the system serves the information required by § 76.13(b)(1) on the Commission and the parties named in § 76.13(a)(6) at least 30 days before commencing such carriage and no objection is filed with the Commission within thirty (30) days after such service is made. See § 1.47 of this chapter.

[7] We note that CATV of Rockford failed to petition for special relief in the form of Special Temporary Authority—a remedy the Commission has granted on previous occasions where delays occasioned by processing would result in hardships—prior to carrying WHA–TV. *See, e.g., Crawfordsville Community Cable Corp.*, FCC 73–1174, 43 FCC 2d 1093 (1973); *Cablevision Investors, Inc.*, FCC 73–1175, 43 FCC 2d 1074 (1973).

carriage of educational stations,[8] and we note that there has been considerable interest in and reliance upon the WHA–TV programming by the local educational authorities. Finally, as we have observed, WHA–TV is a "must carry" station pursuant to Section 76.61(a)(2), for whose addition a certificate of compliance is no longer required. However, we caution CATV of Rockford that such careless practices must cease, and in the future we expect it to be especially meticulous in the operation of its system and adherence to our rules. Turning to the allegation that the system has been misusing its public access channel, we note that it has "wholly ceased" using the channel for other than access purposes. While we have stated that one dedicated noncommercial public access channel is to be made available without charge at all times, we have, on occasion, permitted incidental activity on access channels when they are not in use, provided that certain precautions are taken. Since CATV of Rockford has ceased all non-access activity, we do not reach the question of whether using the channel for a television guide is acceptable, and, if so, what precautions are necessary. *See generally, Coldwater Cablevision, Inc.*, FCC 73–281, 40 FCC 2d 58 (1973); *Metro Cable Co.*, FCC 73–89, 39 FCC 2d 169 (1973).

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certification" (CAC–2695), filed on June 8, 1973, by CATV of Rockford, Inc., as amended, IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[8] *See Cable Television Report and Order*, para. 95, FCC 72–108, 36 FCC 2d 143 (1972).

FCC 74-666

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
THE CHESAPEAKE AND POTOMAC TELEPHONE Co.
Licensee of one-way signaling Station KGC590 in Washington, D.C.

MEMORANDUM OPINION AND ORDER

(Adopted June 25, 1974; Released July 1, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration a petition of Radio Communications, Inc. (RCI), filed December 18, 1973, for reconsideration of Commission action of November 14, 1973 (FCC 73-1165, released November 16, 1973) removing the limit of 3,388 paging receivers which might be served by Domestic Public Land Mobile Radio Service Station KGC590 at Washington, D.C., licensed to The Chesapeake and Potomac Telephone Company (C&P). Also before the Commission are an Opposition of C&P, filed January 11, 1974, and an RCI reply thereto, filed January 25, 1974.

2. Before treating with the merits of these pleadings it is first necessary to recapitulate briefly the facts leading up to the action of which reconsideration is sought. As stated in our November 14, 1973 Memorandum Opinion and Order, the Commission, by Memorandum Opinion and Order released April 4, 1969 (17 FCC 2d 12), authorized C&P to operate a one-way signaling (paging) station on 152.84 MHz and limited the number of pagers it could serve, with one exception not pertinent here, to 3,388. This was the number of subscribers it had been serving under a then existing developmental authorization. This restriction was imposed to prevent C&P from gaining a competitive advantage over the non-wireline carriers (RCC's) in the Washington, D.C. area while the latter were engaged in a comparative hearing for the separate frequencies which had been allocated for their use. Imposition of the limitation was based on the rationale of the Commission's "headstart doctrine", which was set out most fully in *Mobile Radio Communications, Inc.*, 29 FCC 2d 62 (1971), but modified in *FWS Radio et al.*, 40 FCC 2d 680 (1973). Rather than terminate a service which had been provided to existing subscribers for seven years under a developmental authorization, the Commission chose the middle course of permitting C&P to continue service but limiting the number of subscribers.

3. In our November 14, 1973, action, we lifted the restriction on the number of subscribers because by that time the headstart danger had evaporated since the RCC's were by then offering a paging service.

See *Guardband Decision*, 12 FCC 2d 41 (1968), reconsideration denied 14 FCC 2d 269 (1968), aff'd sub nom *Radio Relay Corp.* v. *FCC*, 409 F. 2d 322 (2d Cir. 1969). Since all of the competing Washington, D.C. carriers, including the RCC's were already offering paging, we saw no reason why C&P should continue to be limited to serving the number of paging units it had served in 1969. Moreover, and as we noted on November 14, 1973, the Washington area RCC's were negotiating towards sharing of the guardband frequencies allocated for their use, thus hastening the time when all of the Washington carriers will be paging on guardband frequencies. Thus we lifted the restriction on C&P subject to the condition that it "shall offer to make available to the non-wireline common carrier for one-way signaling purposes the same dial access interconnection facilities as those utilized by the wireline common carriers in the community; further that the charges for such interconnection and all other facilities of the wireline company used by the non-wireline carriers in the one-way signaling service on frequencies 152.24 and 158.70 MHz, shall be identical with those costs used by the wireline company on frequencies 152.84 and 158.10 MHz in computing its own charges over the same distances when it offers a competitive service, or where distances are different, the same per mile basis; and finally, if a wireline carrier offers or purports to offer any free or reduced rate service in connection with its one-way signaling service, it shall provide the identical service so offered or purported to be offered to customers of any competing non-wireline carrier at the same reduced rate or free of charge."

4. RCI's petition for reconsideration asks that the Commission's removal of the restriction be rescinded until such time as C&P reveals all of the rate base components which C&P has utilized to establish its tariff charges for one-way paging service and until it shows the comparison of these rate base component items to the charges C&P imposes upon RCI for any components furnished RCI by C&P for use in RCI's paging service. After some generalized observations about C&P's monopoly of wireline service, RCI contends that C&P can market its paging service at a cost lower than that available to RCI and, further, that C&P may use its monopoly wireline position to market its paging service. In addition, RCI argues, C&P can take the profit out of RCI's business at will by manipulating the interconnection charges to RCI, although RCI acknowledges that some measure of protection is provided it by the Commission's requirement that C&P may not charge RCI more than the bookcharges C&P makes to itself in establishing the rate base it uses in providing paging service. RCI notes that it has entered into one interconnection agreement with C&P for landline facilities to provide paging, and is negotiating for another agreement.[1] It also indicates that it is engaged in litigation with C&P in the Maryland courts in which it seeks certain cost data from C&P, adding that only when such data is available will RCI know whether interconnection is being provided it on an equitable basis.

[1] RCI refers only to C&P, whereas C&P explains that in the interconnection negotiations, as well as the litigation described below, RCI dealt with The Chesapeake and Potomac Telephone Company of Maryland (C&P of Maryland).

5. C&P's opposition to the RCI petition observes that RCI is here seeking to extend the "headstart" doctrine even though RCI and the two other RCC's in the area are already offering one-way signaling. C&P denies that its actions constitute a violation of Commission or judicial precedent or policy. It points out that the interconnection agreement which it and RCI entered into in 1972 covered only tone-only paging, so that the charges for services comparable to components of the Company's tone only signaling service are the same as the component costs considered in setting the Company's rates, and that RCI requested no cost study figures in connection therewith. C&P adds that the proposed new interconnection agreement with C&P of Maryland at issue covers tone-plus-voice paging. C&P of Maryland offers only tone paging, so that the charges for certain components, although based on the costs used in setting C&P's own rates, include an increment to reflect the additional costs of providing these components for tone-plus-voice service. C&P alludes to the C&P of Maryland litigation with RCI in the Maryland courts but asserts that the dispute has no connection with the provision of one-way paging service, so that the *Guard Band* decision does not apply. It denies that C&P or its Maryland affiliate has ever used its monopoly wireline position to the disadvantage of the RCC's. In conclusion C&P asserts that it has a waiting list for paging service in excess of 2,000 prospective subscribers who would be seriously inconvenienced if the restriction were reimposed. It adds that RCI could avail itself of other remedies before the Commission.

6. In reply RCI incorrectly contends that C&P has urged RCI to seek another forum, whereas C&P in fact concedes that the Commission is the proper forum, but argues that the relief sought is unrelated to the alleged grievance. RCI claims that C&P has been inflexible in interconnection negotiations, and insists that unless it has cost data from C&P, it cannot know whether the latter's interconnection charges are proper. RCI agrees that the Maryland litigation is unrelated to the Commission's *Guardband* decision.

7. We find no merit in RCI's petition. Its allegations are vague and speculative, based entirely on conjecture and surmise, and in no way prove that a condition exists which would call into play the provisions of the "headstart" doctrine. All Washington carriers, including RCI, are now providing one-way signaling service. Hence, the "headstart" doctrine, as modified by *FWS Radio*, *supra*, is inapplicable. RCI displays great fears that C&P will use its monopoly position to deal unfairly in the radio paging marketplace, but fails to demonstrate that it has done or is likely to do so. Insofar as C&P may not be dealing fairly with RCI in interconnection negotiations, there are other remedies which RCI may seek before this Commission, including a formal complaint that C&P has not adhered to the conditions of the grant. What we have, in essence, is a request for relief which is entirely unrelated to the complaint raised, a complaint which fails to specify the actual grievance. We are concerned that we treat fairly with the wireline companies as well as the RCC's. Where, as here, we removed a limitation on the number of subscribers which C&P might serve in order that it might compete on an equitable footing with the

other paging carriers, we will not reimpose that limitation on the basis of vague and unsubstantiated fears such as those voiced by RCI. To do so would disserve the public interest which calls for even-handed treatment of all carriers in a market. It would also vitiate C&P's ability to serve the more than 2,000 prospects who are awaiting service. Should RCI remain convinced that it is being dealt with unfairly by C&P or C&P of Maryland, it is invited to file a complaint with the Commission pursuant to the pertinent provisions therefor.

8. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Radio Communications, Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-616

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of COMMUNITY CABLEVISION CORP., BRYAN AND COLLEGE STATION, TEX. For Certificates of Compliance	CAC-725/CSR-157 (TXO43) CAC-726/CSR-158 (TXO44)

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 20, 1974)

BY THE COMMISSION:

I

1. Community Cablevision Corporation seeks Commission certification to add the television signal of KPRC-TV (NBC), Houston, Texas, to its existing operations at Bryan and College Station, Texas. This matter began on November 17, 1969, when Community Cablevision Corporation (Community) provided notification pursuant to former Section 74.1105 of the Commission's Rules of its intention to carry the distant signal of KPRC-TV on its cable systems at Bryan and College Station, Texas. In so doing, however, it failed to serve a copy of such notice on Channel 6, Inc., licensee of KCEN-TV (NBC), Temple, Texas, which places a predicted Grade B contour over a portion of Bryan. Community subsequently conceded that Channel 6, Inc. was entitled to notification of its intentions to carry KPRC-TV on its Bryan system. On January 14, 1970, Channel 6, Inc. filed an objection to Community's proposed carriage of KPRC-TV but carriage of that station on Community's Bryan system was nevertheless commenced on March 4, 1970.[1] This signal had been carried on a competing cable system, Midwest Video CATV, in Bryan and, according to Community, was therefore grandfathered to the community. Midwest Video CATV carried KPRC-TV from 1954 through May, 1966 when it ceased carriage, according to Community, for technical reasons.

2. In order to determine whether the disputed signal was, in fact, grandfathered, and thus available for carriage on Community's Bryan system, the Commission issued an Order to Show Cause, released July 16, 1970, directing Community to show why it should not be ordered to cease and desist from violation of former Section 74.1105 of the Rules, and the interim processing procedures in Docket No. 18397 on its cable system at Bryan, Texas.[2] On September 28, 1970, the Commission issued a stay *pendente lite* in order to prevent the expansion of a service which might have to be withdrawn in the event

[1] Community provided Channel 6, Inc. with Section 74.1105 notice on January 23, 1970. In view of the protest previously filed by Channel 6, Inc. this notice was deemed to have no decisional significance.

[2] Docket No. 18922, FCC 70-776, 24 FCC 2d 294 (1970).

of an adverse decision to Community prohibiting Community's further offering of the disputed signal to new subscribers on its Bryan system.[3] In view of the novel issue presented, the issuance of the stay, and the necessity of an expeditious resolution of the matter, it was ordered that the closed record be certified to the Commission for final decision.[4] Finally, on February 9, 1971, the Commission concluded that Community did not acquire grandfather rights to carry KPRC–TV on its system at Bryan, and ordered that Community cease and desist from further violation of the Rules and specifically cease and desist from supplying to its subscribers, without prior Commission approval, the signal of KPRC–TV.[5]

3. The above proceeding, however, did not resolve the signal carriage dispute concerning the College Station cable system. In the interim, Community provided notification on July 28, 1970, that it was ready to commence cable service, including carriage of KPRC–TV, at College Station. On September 25, 1970, Channel 6, Inc. filed a request for special relief seeking a Commission order requiring Community to cease carriage of KPRC–TV on the College Station system. In response Community argued that KCEN–TV was not entitled to notification because it did not place a predicted Grade B contour over any portion of College Station and that, in any event, written notification was provided television translator station K76CL, which failed to file a timely objection. K76CL, which serves Bryan and College Station, is owned and operated by Channel 6, Inc. In its reply, Channel 6, Inc., indicated that it filed a timely objection on behalf of KCEN–TV and television translator station K76CL on January 14, 1970 and that the mandatory stay provisions of Section 74.1105(c) applied to Community's proposal for both Bryan and College Station. On October 7, 1970, Community filed a petition for declaratory relief requesting a determination by the Commission whether in fact carriage of KPRC–TV was authorized for carriage on its cable system at College Station. On October 21, 1970, Channel 6, Inc. filed its opposition to the petition for declaratory relief. Notwithstanding its contentions in support of carriage, Community did cease carriage of KPRC–TV on its cable system at College Station even though the cease and desist order of February 9, 1971, applied only to carriage of this signal on its cable system at Bryan.

4. Subsequently, on May 27, 1971, relying for support on the Commission's suggestion in the decision of February 9, 1971, that a waiver request might be appropriate, Community filed a petition for waiver of the requirements of Section 74.1107 of the Commission's proposed rules and the interim processing procedures in Docket No. 18397 to reoffer the distant signal of KPRC–TV to its cable subscribers at Bryan and College Station. The Commission had indicated in its decision that it was not inflexible in the application of its rules, stating:

> Where a showing of public need is made and the importation of particular programs will not interfere significantly with our small-market policies, consideration may be given to a petition for a limited exception from the provisions of our rules (e.g., as to particular programs of special interest to the area for a specified period of time).[6]

[3] Docket No. 18922, FCC 70–1026, 25 FCC 2d 703 (1970).
[4] Docket No. 18922, FCC 70–1191, 26 FCC 2d 289 (1970).
[5] Docket No. 18922, FCC 71–131, 27 FCC 2d 475 (1971).
[6] Docket No. 18922, FCC 71–131, 27 FCC 2d 475, 479 (1971).

In a concurring statement, Chairman Dean Burch expressed similar concern by stating that the Commission's opinion did leave open the question of waiver upon a showing of public need and that the importation in question would not be contrary to Commission policy. He further stated:

> I simply wish to make clear that our action today should not be taken as foreclosing such a request, since, as the record presently stands, there is a substantial question as to whether carriage of this signal, at least to some limited extent, will not serve the public interest, by making available in-State programming of particular interest to the community and without adverse consequences to local broadcast service.[7]

Section 74.1107 of the Commission's proposed rules and the interim processing procedures in Docket No. 18397 were subsequently superseded by the adoption of the *Cable Television Report and Order* on February 2, 1972, before Commission action was taken on the waiver request. Consistent with paragraph 114 of the *Order*,[8] Community filed, on June 20, 1972, applications for certificates of compliance and petitions for special relief which specifically incorporate by reference its previously-filed petition for waiver and the documents submitted in connection with Docket No. 18922. On July 13, 1972, Channel 6, Inc. filed oppositions to Community's applications and petitions, and in so doing, incorporates its opposition to petition for waiver of former Section 74.1107. On February 19, 1974, Community filed a "Supplement to the Applications for Certification and a Petition for Grant", alleging once again grandfather rights to KPRC–TV but relying now upon "current, pertinent precedent" and a change in Commission's rules concerning grandfathering. On March 13, 1974, Channel 6, Inc. filed an "Opposition to the Supplement and Petition for Grant" and on March 25, 1974, Community filed its reply.[9]

II

5. Community's cable television systems at Bryan and College Station are located within a smaller television market (Bryan-College Station) and currently carry the following television broadcast signals:

KVUE (ABC), Austin, Texas
KTVV (formerly KHFI–TV) (NBC), Austin, Texas
KTBC–TV (CBS), Austin, Texas
KBTX–TV (CBS/ABC), Bryan, Texas
KAMU–TV (Educ.), College Station, Texas
KUHT (Educ.), Houston, Texas
KTRK–TV (ABC), Houston, Texas
KHOU–TV (CBS), Houston, Texas
KHTV (Ind.), Houston, Texas
KCEN–TV (NBC), Temple, Texas

Community already provides the signals of a full network station of each of the major national television networks and, accordingly, is pre-

[7] Docket No. 18922, FCC 71–131, 27 FCC 2d 475, 480 (1971).
[8] FCC 72–108, 36 FCC 2d 188 (1972).
[9] On March 29, 1974, the Commission received a copy of a resolution passed by the City Council of Bryan and on May 2, 1974, the Commission received a copy of a resolution passed by the City Council of College Station in which both the City of Bryan and City of College Station acknowledge their support of Community's efforts to obtain proper certification for carriage of KPRC–TV.

cluded from carrying the distant signal of KPRC–TV, an NBC affiliate. Community therefore requests a waiver of Section 76.59 of the Rules [10] to carry KPRC–TV, contending that a grant of the waiver would serve the "public interest by making available in-state programming of particular interest to the community without adverse consequences to local broadcast service."

6. In support of the waiver request, Community alleges a community of interest between the Bryan-College Station area and Houston. Community notes that: approximately one-half of the households in the Bryan-College Station area depend in large part on the news from Houston newspapers—the most widely read out-of-town newspapers; residents in the Bryan-College Station area transact a significant amount of out-of-town business in Houston; the residents in Bryan and College Station rely to a significant extent on Houston advertising and travel to Houston for shopping; the residents in Bryan-College Station look to Houston for sporting events, social and cultural activities; moreover, their family, business, recreational and cultural ties in Houston are firmly established. Thus, it is argued, Community should be permitted to carry KPRC–TV notwithstanding Section 76.59(b) of the Commission's Rules, in view of the community of interest which allegedly exists between the Bryan-College Station area and Houston. Further, Community alleges that carriage of KPRC–TV will afford cable subscribers the opportunity to view network programs unavailable on KTVV and KCEN–TV, in addition to news broadcasts, weather reports, children's programming, religious programming and other programs broadcast by KPRC–TV which are of particular interest to the residents in the Bryan-College Station area. In support of this contention, Community relies on a programming study it conducted between September 27, 1970, and April 3, 1971, which purportedly shows the actual disparity in network and non-network programming on KPRC–TV and the other NBC affiliates which are available to cable subscribers in Bryan and College Station. Community also relies on letters of cable subscribers, which are submitted in support of the waiver to show where the public sentiment, if not the public interest lies. In contrast to the above, Community asserts that the programming of KCEN–TV, Temple, Texas, is unresponsive to the interests and needs of the residents in the Bryan-College Station area, but rather reflects the orientation of its principal audience with Austin and Dallas, metropolitan neighbors of Temple.[11] Thus, it is argued, advertisers of the Austin and Temple television stations are not "in competition" for the patronage of Bryan-College Station residents. With respect to carriage of KPRC–TV, Community concedes that some fractionalization of the Bryan-College Station audience may result, but states that no local broadcasters have objected to its proposal. In fact, Community argues that the only objection on this basis has come from a station whose economic interest

[10] Section 76.59(b) provides in pertinent part: "Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of one independent television station."

[11] The distance from Bryan and Houston is 85 miles; whereas from Bryan to Temple, 66 miles; to Austin, 86 miles.

in the area is marginal at best. Even assuming that slight economic injury would result, Community nevertheless believes that the public interest considerations, which the Commission rules do not adequately reflect in this instance, should prevail over the slight economic injury to any one broadcaster. Notwithstanding the above, Community contends, in its supplemental filing, that the signal of KPRC–TV is grandfathered to the communities of Bryan and College Station, under the Commission's new cable television rules and by virtue of the Commission's rationale in *Southern Illinois Cable TV Company*[12] and other related decisions. Community states that the Commission's posture on grandfathering has changed and that the Commission's previous decision in *Community Cablevision Corporation* is no longer controlling.

7. In its opposition, Channel 6, Inc. contends that carriage of KPRC–TV was inconsistent with Section 74.1107 of the Rules and the interim processing procedures in Docket No. 18397 and is now inconsistent with Section 76.59 of the Commission's new cable television rules. Channel 6, Inc. states that Community's petition is inconsistent with the Commission's own directive in Docket No. 18922 in that it requests the entire program fare of KPRC–TV and is, in essence, an untimely petition for reconsideration of Docket No. 18922. It states that the residents in Bryan and College Station do not depend in large part on Houston papers for news but on the *Bryan Eagle*, a local newspaper with a circulation in excess of that of the Houston papers in these communities. Channel 6, Inc. also states, contrary to Community's implied assertions, that KCEN–TV qualifies as a "full network station" pursuant to Commission rules. Further, it states that Community already provides its subscribers with more than the minimum number of signals specified in Section 76.59 of the Rules. Thus, Community's proposal to import KPRC–TV, it is argued, is unwarranted, unnecessary, and will only undermine the viability of KCEN–TV and that of television translator station K76CL in which a significant investment has been made to improve service to Bryan and College Station. Moreover, Community's claim that no local broadcasters have objected is erroneous because Channel 6, Inc., as licensee of K76CL, has objected to carriage of KPRC–TV. Channel 6, Inc. also alleges that Community's claim of superior programming on KPRC–TV is without foundation. Finally, Channel 6, Inc. objects to Community's attempt to relitigate the entire question of grandfathering and carriage rights to KPRC–TV and believes that the Commission precedent relied upon by Community on the issue of grandfathering is inapplicable in this instance.

III

8. As we have previously determined, Community has not acquired grandfather rights to KPRC–TV. *Community Cablevision Corp., supra*, at 477. *Southern Illinois Cable TV Co., supra*, which Community cites, is not on point, since that decision was based on a previous Commission determination allowing importation of distant signals in

[12] FCC 73–1274, 44 FCC 2 460, 467 (1973).

the communities in question. With respect to Community's request for waiver of Section 76.59 to carry the station we find that Community has not persuasively shown that unusual circumstances are present which warrant special relief and a departure from our regulatory scheme. As stated in paragraph 89 of the *Cable Television Report and Order*, we designed our market policies to minimize possible impact on local broadcasting by establishing standards of television service that vary with market size. As for additional signals, we stated that cable systems in smaller markets would not be permitted to import network or independent television signals beyond the designated 3–1 minimum service level of a full network station of each major television network and one independent station. We recognized that as with all rules designed to balance competing interests, there may be unusual circumstances that do not fit the rule. In this instance, we are not presented with substantive evidence that unusual circumstances exist. Community already meets the minimum level of signal carriage diversity permitted by the carriage rules. In fact, with respect to NBC affiliates, cable subscribers in Bryan and College Station receive a complement of stations in excess of the number specified in Section 76.59. Thus, to permit importation of KPRC–TV would be a substantial departure from our rules notwithstanding the claimed community of interest with Houston. Moreover, full-time carriage of KPRC–TV even with program exclusivity protection for the affected stations, is inconsistent with the Commission's directive in *Community Cablevision Corporation*, *supra*, wherein it was indicated that consideration would be given upon a showing of public need for particular programs. We believe that Community's current carriage of other Houston signals provides a sufficient amount of independent programming, news, weather reports, etc. to compensate for whatever programming Community alleges is not otherwise available on the NBC affiliates at Austin and Temple. To the extent KTVV and KCEN–TV do not carry network programs, Community may carry network programs from distant stations whenever those programs are not cleared locally by the stations normally carried on the cable systems as provided by Section 76.59(d)(2) of the Rules. This provision which was specifically adopted upon our reconsideration of the *Cable Television Report and Order* assures cable subscribers the availability of full network service.[13]

Accordingly, IT IS ORDERED, That the subject applications for certificates of compliance (CAC–825, CAC–726) and petitions for special relief (CSR–157, CSR–158) filed by Community Cablevision Corporation ARE HEREBY DENIED.

IT IS FURTHER ORDERED, That the objections to the subject applications and petitions filed by Channel 6, Inc. ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[13] *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326 (1972).

FCC 74–618

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CSRA CABLEVISION, INC., NORTH AUGUSTA, S.C.	CAC–127, 623 SC032
CSRA CABLEVISION, INC., AIKEN COUNTY, S.C.	CAC–128, 634 SC033
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1974; Released June 20, 1974)

BY THE COMMISSION:

1. CSRA Cablevision, Inc., operator of cable television systems at North Augusta and certain unincorporated portions of Aiken County, South Carolina, and Rust Craft Broadcasting Company, licensee of Station WRDW–TV, Augusta, Georgia, have filed petitions for reconsideration of portions of the Commission's action in *CSRA Cablevision, Inc.*, FCC 72–1078, 38 FCC 2d 297 (1972).[1] The primary issue presented involves carriage of Stations WOLO–TV and WNOK–TV, both Columbia, South Carolina, on CSRA's cable systems. In *CSRA Cablevision, Inc.*, carriage of WOLO–TV, an out-of-market[2] ABC affiliate, was authorized because insufficient evidence was supplied to classify a local Augusta Television Broadcast Station, WJBF, as a full ABC network station. Also in that decision, carriage of Station WNOK–TV, an out-of-market CBS affiliate, was denied because another local Augusta station, WRDW–TV, was found to be a full CBS network station pursuant to Section 76.5(1) of the Commission's Rules. Rust Craft claims that the Commission's decision authorizing carriage of WOLO–TV was in error because grandfathering was CSRA's sole justification for carriage of WOLO–TV and Rust Craft did not have the opportunity to refute the Commission's finding of WJBF's partial network status, on which the Commission's decision was actually based. As to the denial of carriage of WNOK–TV, CSRA claims that the Commission failed to consider its grandfathering argument in favor of authorization. We agree that CSRA's grandfathering arguments concerning WOLO–TV and WNOK–TV were not expressly considered in our previous decision, and we will examine them fully herein. Moreover, CSRA requests reconsideration of the

[1] To the extent that Rust Craft is also seeking a stay of our previous decision, pending consideration of its reconsideration petition, that request is rendered moot by our action herein.

[2] Both North Augusta and the specified portions of Aiken County are located within the specified zone of the Augusta, Georgia, smaller television market. A cable system located in a smaller television market may carry the nearest full network stations or the nearest in-state full network stations pursuant to Section 76.59(b)(1) of the Rules.

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Commission's finding that WRDW–TV is a full CBS network station. Additionally, CSRA requests reconsideration of that portion of the Commission order which limited the area within Aiken County for which CSRA was certified. Rust Craft and CSRA have opposed each other's petitions and have replied to the oppositions.

2. On January 29, 1971, CSRA filed a notification of its intention to commence carriage of WOLO–TV, WNOK–TV, WIS–TV, and other signals, pursuant to former Section 74.1105 of the Commission's Rules. Contemporaneously, CSRA filed a request for waiver of former Section 74.1107(a) of the Rules to allow carriage of WOLO–TV, WNOK–TV, and WIS–TV. At the time that CSRA filed its notification, Augusta, Georgia, was not considered a "top 100 market",[3] but August was listed as a "major market" in the proposed rules that were then under consideration in Docket 18397.[4] Although Rust Craft claims it filed a February 25, 1971, letter of objection to CSRA's waiver request, Commission records do not indicate the filing of such an objection. A letter of inquiry regarding the Rust Craft pleading was sent to counsel for Rust Craft on March 2, 1973. Rust Craft responded on March 12, 1973, and CSRA submitted comments on March 19, 1973. Affidavits filed by Rust Craft indicate that its letter of opposition was mailed to the Commission on or about February 25, 1971. On March 8, 1971, Rust Craft filed an affidavit of service dated March 2, 1971, and an affidavit of persons with knowledge of factual allegations dated March 5, 1971, both of which were related to the missing February 25, 1971, objection.

3. Since it was common Commission practice to consider a timely opposition to a former Section 74.1107 waiver request as an objection to a contemporaneously filed notification pursuant to former Section 74.1105, Rust Craft's February 25, 1971, letter of opposition would be considered a proper objection to CSRA's notification, if timely filed. A timely filed objection would preclude CSRA from claiming that WOLO–TV and WNOK–TV are grandfathered signals, while an untimely objection would not.[5] CSRA's claim that the letter was untimely is based on the following contentions: (a) that inquiries to the Commission by CSRA counsel in March or April, 1971, July, 1971, and November, 1971, indicated no objection had been filed by Rust Craft, but rather only the affidavit of persons with knowledge of factual allegations, dated March 5, 1971; (b) that no basis exists for a presumption that the Commission timely received Rust Craft's objection, since the objection was not served on CSRA until March 2, 1971, two days beyond the time for a timely objection, and the affidavit in support of the objection (normally attached thereto) was not sent to the Commission until March 5, 1971; (c) that in any event Rust Craft's letter did not constitute a valid objection since no affidavit of service and no affidavit of factual allegations were filed within the required 30-day period. Rust

[3] Former Section 74.1107(a) of the Rules specified that top 100 market rankings were to be determined by the ratings of the American Research Bureau on the basis of net weekly circulation for the most recent year. Augusta, Georgia, was ranked No. 104 in the March, 1970, ARB ratings.

[4] *Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397*, 15 FCC 2d 417, 459 (1968).

[5] Under former Section 74.1105(c), an objection to notification of proposed service had to be filed within 30 days of the notice in order to be timely. That deadline, in the instant case, was February 28, 1971.

Craft's claim that its February 25, 1971, letter was timely filed is based on the following contentions: (a) that the letter was timely received and was in the Commission files. Although the letter is not in Commission files at present, Rust Craft states that a Commission staff attorney located the letter in June, 1972, and counsel for Rust Craft remembers that the letter had a Commission receipt mark and date but cannot recall the exact date; (b) that a strong presumption exists that the letter was mailed and timely received by the Commission. According to a Rust Craft affidavit, Rust Craft's objection was written on February 25, 1971, by Fred Weber, Executive Vice President of Rust Craft Broadcasting Company and was placed in a Ventnor, New Jersey, mailbox in the usual course of business. A copy of the letter was contemporaneously mailed to the office of WRDW–TV in Augusta, Georgia and was received on February 26, 1971.

4. Rust Craft's claim that its February 25, 1971, letter of opposition was mailed to the Commission in the usual course of business is undisputed. It is an accepted rule that a letter mailed is presumed to be received by the addressee unless a showing to the contrary can be made. *Delaware County Cable Television Co., et al.*, FCC 68–684, 13 FCC 2d 899, 900 (1968); *accord, El Paso Cablevision, Inc.*, FCC 71–65, 27 FCC 2d 835 (1971); *Midwest Video Corp.*, FCC 73–1043, 43 FCC 2d 262 (1973); *G-F Cable TV, Inc.*, FCC 73–1085, 43 FCC 2d 425 (1973). Additionally, it has been customary practice to consider an objection unaccompanied by an affidavit of service or an affidavit of factual allegations as timely filed and permit the missing affidavits to be subsequently supplied. Consequently, we find that the Rust Craft February 25, 1971, letter was a valid objection and is presumed to have been timely filed; hence, CSRA's claim of grandfathered status for WOLO–TV and WNOK–TV on its cable television systems in North Augusta and Aiken County pursuant to Section 76.65 of the Rules must fail.

5. In *CSRA Cablevision, Inc.*, carriage of WOLO–TV, an out-of-market ABC affiliate, was authorized because insufficient evidence was supplied to classify the local Augusta television station, WJBF, as a full ABC network station. Rust Craft asserts that the Commission's finding that WJBF was not a full ABC network station was unjustified. In support of its assertion of full network status for WJBF, Rust Craft has submitted an analysis of prime time ABC network programming carried by WJBF during a 14-week period. The analysis concludes that WJBF carried ABC network programming at least 85 percent of the possible prime time during the 14-week period, thus meeting the requirement set forth in Section 76.5(1) of the Rules to qualify as a full network station. A letter in support of Rust Craft's position has been filed by Fuqua Television, Inc., licensee of Television Broadcast Station WJBF. Fuqua asserts that WJBF "is now and at all pertinent times has been a 'full network station' (ABC) as same is described in the Commission's Rules." CSRA does not contest the accuracy of Rust Craft's programming analysis of WJBF, but rather challenges the timeliness of the study. CSRA also contends that since its systems in North Augusta and Aiken County now carry WOLO–TV as authorized in *CSRA Cablevision, Inc.*, withdrawal of that signal would cause its subscribers "considerable inconvenience."

Although Rust Craft's program analysis was not submitted with the original application, the public interest requires us to consider this analysis, which we find persuasive that WJBF is a full ABC network station within the meaning of Section 76.5(1) of the Rules. Accordingly, we find CSRA's carriage of WOLO–TV to be inconsistent with the Rules. We note that CSRA has been aware since the filing of Rust Craft's petition for reconsideration that its right to carry WOLO–TV was still in doubt. Thus, while withdrawal of this signal may cause some inconvenience to its subscribers, it must be an inconvenience which CSRA should have taken cognizance of when its first added WOLO–TV to its system.

6. CSRA contends that the Commission erred in its holding that Station WRDW–TV is a full CBS network station, thus denying carriage on its systems of Station WNOK–TV. In support of its contention, CSRA argues that since the Augusta, Georgia, market is the second largest two-station television market in the country, CSRA subscribers do not receive full network programming; and Aiken Cablevision, operator of a cable television system in another portion of Aiken County is authorized to carry WOLO–TV and WNOK–TV, which creates a situation where subscribers of two cable television systems in one county do not receive the same signals. The Commission finds CSRA's contentions without merit. Initially, we note that CSRA has not submitted any new evidence to warrant reconsideration of our determination that WRDW–TV is a full CBS network station. Nor do we attach any particular significance in these circumstances to the fact that Augusta, Georgia, is the second largest two-station television market. For the purposes of our rules, Aiken Cablevision's system in Aiken County constitutes a separate and distinct community since Aiken Cablevision's system operates in a different, noncontiguous section of Aiken County to CSRA's Aiken County system. Thus, we do not believe our decision creates a discriminatory situation where subscribers of two cable systems in one community receive different signals.

7. CSRA's request for an expanded service area is based on the contention that the limitation expressed in footnote 1 of *CSRA Cablevision, Inc.*, denies cable service to approximately 3,000 homes between the service areas of CSRA and Aiken Cablevision. Specifically, Aiken Cablevision operates in the City of Aiken, South Carolina, and certain unincorporated areas of Aiken County surrounding the City of Aiken, while CSRA operates in North Augusta, South Carolina, and certain unincorporated areas of Aiken County surrounding the City of North Augusta. There is a seven-mile gap between the lines of the two systems. CSRA asserts that in this seven-mile gap between systems, the housing density is marginal for cable television service, and if the 3,000 homes in this area are to receive cable television service at all, it will have to come from either CSRA or Aiken Cablevision. CSRA argues that the Commission order limiting CSRA's service area creates a competitive disadvantage, vis-a-vis Aiken Cablevision, which is not subject to any territorial restrictions since it has not applied for a certificate of compliance and will not have to do so until 1977. Finally, CSRA states that while it is aware that certain portions of Aiken County lie within the 35-mile zone of Columbia, South Carolina, it does not now operate, nor has it any intention in the future

of operating its system in any portion of Aiken County lying within the 35-mile zone of Columbia, South Carolina. Rust Craft opposes CSRA's request, and argues that in offering alternative descriptions of its service area in its application, CSRA stated that it was willing to accept whatever limitation the Commission found appropriate, and that arguments of competitive disadvantage in regard to other cable television systems operating in Aiken County are unsubstantiated. Rust Craft concludes that the Commission should not authorize expansion of CSRA's service area, since CSRA has never demonstrated its authority to operate in Aiken County.

8. We find merit in CSRA's request. Based upon the information before us, it does not appear that the unserved area between CSRA's system and Aiken Cablevision's system necessarily represents a separate and distinct community within the meaning of Section 76.5(a) of the Rules. *Compare Telerama, Inc.*, FCC 66–397, 3 FCC 2d 585 (1966); *Mission Cable TV, Inc.*, FCC 66–548, 4 FCC 2d 236 (1966). Also, we note that in three recent decisions, we have recognized that South Carolina counties do not have authority to grant franchises for cable television service. *Television Communications Corp.*, FCC 73–667, 41 FCC 2d 945 (1973); *Palmetto Cablevision, Inc.*, FCC 74–202, 45 FCC 2d 775 (1974); *Lowlands Cablevision, Inc.*, FCC 74–203, 45 FCC 2d 761 (1974). In the ordinary circumstances, the Commission believes that delineations of service areas in counties are the responsibility of local officials. *See* paragraph 66 of the *Clarification of the Cable Television Rules and Notice of Proposed Rule Making and Inquiry*, FCC 74–384, 46 FCC 2d 175, 144 (1974). However, since it appears that in the instant case there is no appropriate franchising authority, we will allow CSRA to specify the full area within Aiken County it intends to serve with its system. While it would have been more timely for CSRA to have fully described the particular circumstances in Aiken County in its original application, we believe the public interest would be best served if we modify our original ruling. Accordingly, we will issue a modified certificate of compliance when CSRA notifies the Commission of the specific areas it will serve in Aiken County.

In view of the foregoing, the Commission finds that reconsideration of the grants of certificates of compliance to *CSRA Cablevision, Inc.*, (CAC–127, 623) with respect to carriage of Station WOLO–TV, and with respect to the service area specified in Aiken County (CAC–128, 634) would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed by Rust Craft Broadcasting Company IS GRANTED, and appropriate certificates of compliance will be issued, which delete carriage of Station WOLO–TV.

IT IS FURTHER ORDERED, That the "Petition for Stay" filed by Rust Craft Broadcasting Company IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration and Response to Petition of Rust Craft Broadcasting Company for Reconsideration and for Stay" filed by CSRA Cablevision, Inc., IS GRANTED to the extent indicated in Paragraph 8 above and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-639

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CSRA CABLEVISION, INC., THOMSON, GA. Petition for Special Relief and Declaratory Ruling Petition for Order To Show Cause	SR-372156

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 27, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; REID AND HOOKS CONCURRING IN THE RESULT.

1. This proceeding commenced on March 27, 1972, when Rust Craft Broadcasting Company, licensee of Station WRDW-TV, Augusta, Georgia, filed a petition for special relief requesting the Commission to issue a declaratory ruling that CSRA Cablevision, Inc., be prohibited from carrying certain distant signals on a cable television system it proposed to operate at Thomson, Georgia. Thomson, Georgia is located in the Augusta, Georgia television market, now a smaller market. CSRA opposed this petition and Rust Craft then petitioned the Commission to issue an order to show cause directed against CSRA for commencing operation on March 31, 1972, in violation of the Commission's former and current rules.[1] CSRA has opposed this request as well.

2. On August 18, 1971, pursuant to former Section 74.1105 of the Commission's Rules, CSRA filed a notice of its intent to commence cable service in Thomson, Georgia with the following signals:

WRDW-TV (CBS, Ch. 12), Augusta, Georgia
WJBF (ABC, Ch. 6), Augusta, Georgia
WATV (dark), Augusta, Georgia
WCES-TV (Educ., Ch. 20), Wrens, Georgia
WEBA-TV (Educ., Ch. 14), Allendale, South Carolina
WSB-TV (NBC, Ch. 2), Atlanta, Georgia
WAGA-TV (CBS, Ch. 5), Atlanta, Georgia
WQXI-TV (ABC, Ch. 11), Atlanta, Georgia
WTCG (Indep., Ch. 17), Atlanta, Georgia
WGTV (Educ., Ch. 8), Athens, Georgia

In an August 24, 1971, letter to CSRA filed with the Commission, Rust Craft acknowledged the CSRA notice and listed the commercial sta-

[1] The original Rust Craft petition was filed pursuant to former Section 74.1109 of the Commission's Rules. We find that Rust Craft has satisfactorily supplemented its petition to demonstrate continued relevance to the present cable television rules, pursuant to paragraph 114(F) of the *Cable Television Report and Order*, 36 FCC 2d 143, 188. Since it is alleged that CSRA is operating a cable system with at least some of the distant signals originally in question, we are treating the subject petition as a show cause request. Rust Craft requested that the Commission prohibit CSRA from providing service to new subscribers in Thomson until the subject controversy was resolved.

tions proposed, but did not specifically object to their carriage on the Thomson system. The letter stated that CSRA had not demonstrated the applicability of Commission Rules to its system, and concluded with the following:

> We await prompt response so that WRDW–TV may be timely in any additional filings necessary with the Federal Communications Commission to insure complete compliance by CSRA and by WRDW–TV consistent with all existing Rules and Regulations of the Commission on the questions of carriage, non-duplication, and importation of distant signals.

No other pleadings were filed in reference to the CSRA system until the subject Rust Craft petitions. At issue is the legality of carriage of the three Atlanta, Georgia network stations (WSB–TV, WAGA–TV, and WQXI–TV) by CSRA, which has since established service with several hundred subscribers.

3. Rust Craft contends that signal carriage on the Thomson system should be considered in the context of former Section 74.1107 of the Rules,[2] and that CSRA could not carry the distant Atlanta signals without making the requisite showing to the Commission. More specifically, Rust Craft states that CSRA did not file a petition to waive the provisions of former Section 74.1107, and therefore did not receive the necessary Commission authorization. Rust Craft's contention that a waiver was required is based on the position that Augusta, Georgia was a top-100 television market when authorization for the Atlanta signals was sought. This market ranking, Rust Craft argues, was determined by the following: (a) Augusta was ranked as the 96th television market when the *Second Report and Order*, 2 FCC 2d 725 (1966), was adopted; (b) the Augusta market was ranked 99th for the purposes of the proposed 1968 Rules, in both the *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, 15 FCC 2d 417 (1968), and the *Further Notice of Proposed Rulemaking in Docket No. 18397*, 22 FCC 2d 603 (1969); and (c) the Commission intended to fix the top 100-market rankings for the interim procedures as well as the proposed rules in its *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, *supra*.[3] Even assuming that Augusta was a smaller market at the time CSRA sought authorization, Rust Craft claims that the mandatory stay provision of former Sec-

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[2] Former Section 74.1107 (a) and (b) provided that: (a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

[3] Rust Craft finds this intent expressed in paragraphs 45–47 of the *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, at 435.

tion 74.1105(c) of the Rules [4] was properly invoked by its August 26, 1971 letter and CSRA was precluded from carrying the Atlanta signals. Rust Craft argues that its letter constituted a valid objection since it referred to the proposed signal carriage's inconsistency with the Commission's Rules. Additionally, it maintains that the form of its objection was unimportant since a petition could be submitted "informally, by letter," pursuant to former Section 74.1109(b) of the Rules. Therefore, Rust Craft contends that carriage of the three Atlanta network stations violated our former Rules, regardless of the Augusta market's designation.

4. In reply, CSRA states that Augusta was a smaller market when notification of its intent to commence service was given. This contention is based on former Section 74.1107(a), which stated in part that, "the market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year." Augusta was ranked 104th in the March, 1970 American Research Bureau survey, released in early 1971. CSRA acknowledges that Augusta was listed as the 99th market in the proposed 1968 Rules, but emphasizes that those rules were only proposed, never adopted. They simply served to caution CSRA that if it commenced the carriage of unopposed distant signals, such carriage, if inconsistent with the proposed rules, would be subject to deletion upon their adoption. In addition, CSRA claims that the situation in Thomson was unaffected by the interim procedures instituted by the Commission in *Docket No. 18397*, citing several statements in the 1968 rulemaking proceeding in support of this contention.[5] By maintaining that Augusta was a smaller market, CSRA argues that its notification of proposed service was sufficient to authorize the signals listed. Although Rust Craft could have objected to CSRA's proposal, thereby implementing an automatic stay, its reply was ambiguous. CSRA insists that Rust Craft failed to exercise "due diligence" and cannot now complain. Its August 26, 1971, letter cannot be considered a proper objection filed pursuant to former Section 74.1109 of the Rules, since its subject matter was non-duplication, importation of signals into major markets, and retransmission consent—matters totally irrelevant to notification in a smaller market.

5. Rust Craft suggests that CSRA appears to have started operations on March 31, 1972, the effective date of the Commission's present cable television rules.[6] Consequently, CSRA should have obtained

[4] Former Section 74.1105(c) provided that: (c) Where a petition with respect to the proposed service is filed with the Commission pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures: Provided, however, That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

[5] Paragraph 59 of the *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397, supra*, at 441, and paragraphs 15 and 19 of the *Memorandum Opinion and Order in Docket No. 18397*, 22 FCC 2d 589, at 594 (1968).

[6] This conclusion is drawn from CSRA statements that the system was operational on March 31, 1972, and that it intended to seek certification pursuant to Section 76.13(d) of the Rules. Prior to amendment on reconsideration, Section 76.13(d) pertained to systems seeking certification of existing operations in accordance with Section 76.11(b). Although Section 76.11(b) states that, "no cable television system lawfully carrying television broadcast signals in a community prior to March 31, 1972, shall continue carriage of such signals beyond the end of its current franchise period, or March 31, 1977, whichever occurs first, unless it receives a certificate of compliance." Rust Craft erroneously attempts to refer to Section 76.13(b), which prior to amendment, dealt with systems not commencing carriage of signals before March 31, 1972.

a certificate of compliance before beginning to operate in Thomson. Since CSRA has not received such authorization, Rust Craft contends that CSRA is operating in violation of the Commission's Rules, and therefore an order to show cause should be issued. In contrast, CSRA unequivocally states that it commenced operation on March 30, 1972, and that steps were taken to apprise Rust Craft of that fact. Thus, it argues that its operations were consistent with both the former and present rules, since signals authorized by former Section 74.1105 of the Rules and not inconsistent with former Section 74.1107 are grandfathered, as Footnote 58 of the *Cable Television Report and Order*, 36 FCC 2d 143, establishes.[7]

6. Clearly then, we must decide the following matters: (a) which market ranking of Augusta, Georgia was applicable when CSRA submitted its notification pursuant to former Section 74.1105; (b) whether Rust Craft's letter of August 26, 1971, invoked a mandatory stay of CSRA's proposed operations; (c) whether CSRA began serving Thomson, Georgia on March 30, 1972; and (d) whether CSRA is required to file an application for a certificate of compliance at this time. First, we find that a market's ranking must be determined by the existing rules at the time in question. Therefore, former Section 74.1107 (a) of the Rules is controlling in this instance, and Augusta was a smaller television market in August, 1971 according to the then most recent ARB survey. Until a regulatory body adopts the rules it has proposed in a rulemaking proceeding, its existing rules must govern the rights and obligations of those subject to its jurisdiction. As we stated in the *Memorandum Opinion and Order in Docket No. 18397*, 22 FCC 2d 586, 591 (1970):

> Under the Administrative Procedure Act and relevant judicial decisions, the Commission is bound to follow its existing rules until they have been amended pursuant to the procedures specified by that act or unless it finds in an individual case that a waiver of the rules is warranted. Thus, the rules adopted in the *Second Report and Order*, 2 FCC 2d 725 (1966), as amended by subsequent orders, are governing during the pendency of the proposed rulemaking in this docket.

Moreover, we clearly indicated that this would be our approach to the list of designated major market communities drawn up for *Docket No. 18397*. In a *Further Notice of Proposed Rulemaking in Docket No. 18397*, 22 FCC 2d 603, 607 (1970), we described the list as one on which "we have reached no final determination. The parties are requested to comment on these revisions and to focus on what other modifications in the *proposed list* of designated communities would be appropriate. . . . We do not plan any further modification *during the proposal stage* . . ." (emphasis added). Since Augusta must be considered a smaller television market within the purview of Section 74.1107 at the time in question, the signals proposed by CSRA were

[7] CSRA explains that its franchise with the City of Thomson is being amended to comply with Part 76, Subpart C of the Rules. Upon amendment, CSRA will file an application for a certificate of compliance in which it will also demonstrate consistency with the signal carriage provisions of the rules. No such application has yet been filed.

consistent with signal carriage rules then applicable.[8] Consequently, unless a mandatory stay was properly invoked, CSRA could proceed with the service it proposed.

7. To invoke a mandatory stay, former Section 74.1105(c) required that a petition be filed with the Commission pursuant to former Section 74.1109. Rust Craft's letter of August 26, 1971, did not fulfill these requirements. Section 74.1109(c) provided that the petition must "state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest." Rust Craft's letter can scarcely be characterized as a clear and unambiguous request for relief. Rather, it definitely indicated that additional pleadings were contemplated, pleadings which actually were never filed. Consequently, we cannot hold that Rust Craft triggered a mandatory stay by filing this letter. And the signals proposed for carriage in Thomson, Georgia were therefore authorized.

8. We find no reason to question CSRA's statement, supported by affidavit, that service commenced in Thomson, Georgia on March 30, 1972. Rust Craft's argument can only be viewed as conjecture since no factual allegations were made. As a consequence, CSRA is not now required to seek certification for signals previously authorized.[9]

In view of the foregoing, we find that a grant of the requested special relief and issuance of the requested order to show cause would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the petition requesting special relief, filed March 27, 1972 and the petition requesting the issuance of an order to show cause, filed May 15, 1972, by Rust Craft Broadcasting Company, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[8] Former Section 74.1107(c) governed signal carriage by cable systems located beyond the Grade A contours of a television broadcast station in the 100 largest television markets. In such cases, signal carriage could begin unless countermanded by the Commission or an interested party. Section 74.1107(c) provided that:

No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

[9] See Section 76.11(b) of the Rules.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
CHICANO AIRWAVES PROGRAMING COMMITTEE
Concerning the Fairness Doctrine Involving Station KNTV, San Jose, Calif.

JUNE 26, 1974.

This is in reference to your complaint against television station KNTV, San Jose, California. You stated that KNTV was "using the fairness doctrine to limit the programming of controversial issues on La Voz De Aztlan—a monthly one-hour program devoted to Chicano affairs," by requiring that coverage be given on the program to both sides of any controversial issue presented; that this policy was in violation of a "Statement of Policy Agreement" between KNTV and the South Bay Community Coalition for Media Change, "an agreement which is part of the current KNTV license"; that this policy "gave the Chicano Community less than one in 720 hours of monthly air time"; that KNTV's conduct was not in the public interest, as "nearly 20% of KNTV's viewing area audience is Chicano"; that "the decision on the presentation of opposing viewpoints is not entirely within the discretion of the licensee," since the "Statement of Policy Agreement" stated, "in reference to the Chicano Airwaves Programming Committee that, 'This Committee will have the option of choosing, or approving, with the agreement of the station, program subject material as well as personnel for such programming' "; and that, as a result of this language "KNTV cannot force the Chicano Community to program non-Chicano perspectives on the Chicano Community's monthly one-hour program without the consent of that Community's representative—the Chicano Airwaves Programming Committee".

In a letter dated January 16, 1974 the Commission requested KNTV to comment on your complaint, including its specific comments in light of the fact that, under long standing Commission policy, the fairness doctrine does not require that a licensee achieve a balance of contrasting views within a single program or series of programs, but requires only that licensees achieve a balance in their overall programming.

In its response filed with the Commission on February 5, 1974, KNTV stated that it realized that "the Commission does not require a licensee to achieve balance of opposing views within a single broadcast or even in the same series of programs"; that there have been a number of issues presented on La Voz de Aztlan for which balance had been achieved on other programming; that there were "certain very volatile issues . . . wherein [KNTV] believe[s] it is in the public interest for the antagonists to be heard within the same format," citing certain examples; and that it would be against the public interest to allow your organization "complete programming discretion" in the presentation of the program.

In your reply to the response of KNTV, filed with the Commission on February 21, 1974, you stated that the "position of CAPC remains as stated in our initial correspondence."

The Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.

However, under the fairness doctrine if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. In the performance of this responsibility licensees have considerable discretion in determining what issues are to be presented, the format in which they are to be presented, which contrasting viewpoints are to be presented, and the spokesman and time allotted for each. The Commission will only review complaints under the fairness doctrine to determine whether the licensee can be said to have acted reasonably and in good faith.

In its *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949), the Commission stated:

> [B]oth the Commission and the Courts have stressed that this responsibility devolves upon the individual licensees, and can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments.

Although you claim the licensee's "action is in violation of the Statement of Policy Agreement," since it is the licensee's responsibility for compliance with the fairness doctrine, the Commission will not interfere with the licensee's judgment herein as to how it believes it should meet such responsibility. Accordingly, no Commission action is warranted at this time.

However, broadcast licensees are required to operate in the public interest. To fulfill its public interest requirment a licensee is required to ascertain the "significant problems and needs of the area served by the station" and to maintain a listing of programming broadcast by the station "designed to help meet that problem or need." (Commission Rules and Regulations, Section 1.526.) This information must be submitted with license renewal applications, and a station's public service performance is part of the criterion upon which license

renewal applications are judged. Section 309(d) of the Communications Act states:

> Any party in interest may file with the Commission a petition to deny any application . . . The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistant with [the public interest, convenience, and necessity.] . . .

KNTV's broadcast license expires on December 1, 1974 (Commission Rules, Section 73.34). KNTV's license renewal application must be submitted no later than August 1, 1974 (Commission Rules, Section 1.539).

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
BRUCE SAGAN
Concerning the Fairness Doctrine Involving Station WMAQ–TV, Chicago, Ill.

JUNE 26, 1974.

This is in reference to your complaint to the Commission, dated May 29, 1974, against station WMAQ–TV, Chicago, Illinois, filed on behalf of Mr. Bruce Sagan. You state that on January 4, 1974 "WMAQ–TV broadcast comments by Mr. Len O'Connor" wherein Mr. O'Connor "stated that Mr. Sagan, who was appointed by the Governor of Illinois as the Chairman of the Illinois Arts Council, was one of a group of allegedly 'bad people . . . who have or will get [the Governor] in trouble' as appointees to positions in state government"; that Mr. O'Connor further stated that Mr. Sagan had acted in this capacity to secure "a Council grant for a foundation directed by his wife—a grant that exceeded that given by the Council to some of the largest and most prestigious cultural institutions in Chicago"; and that these statements constituted an attack on the honesty, character, integrity or like personal qualities of Mr. Sagan in that they accused him "of deferring to his private interest rather than honoring his public trust in the making of Council grants." You contend that the broadcast "did not simply take issue with decisions made by Mr. Sagan in his position as Chairman of the Arts Council, but rather impugned his integrity and honesty in making such decisions"; that the attack was made during the presentation of views on a controversial issue of public importance, namely "whether the Governor of Illinois had dismantled the patronage system as he had promised to do, and whether the appointment of Mr. Sagan as Chairman of the Arts Council was a proper or wise decision"; that this broadcast "created an imbalance in WMAQ–TV programming on the two controversial issues noted above"; and that "[t]o the best of [your] knowledge, station WMAQ–TV has not presented and does not plan to present" contrasting viewpoints.

You also allege that Mr. O'Connor "had a significant private interest in the subject matter" in that his wife, Mrs. Jane O'Connor, had "been a member of the Illinois Art Council since 1971, and was recommended for the position of Chairman to which Mr. Sagan was appointed, and serves on the board of directors or organizations which receive funds from the Illinois Arts Council"; and that Mr. O'Connor failed to disclose this personal interest as required by the Commission.

You enclosed a copy of a letter dated January 11, 1974, from you to WMAQ–TV, wherein you disputed the accuracy of the facts as stated in Mr. O'Connor's commentary and requested time to refute them. You also enclosed a copy of a response to that letter from Mr.

Don H. Reuben, counsel for WMAQ–TV. Mr. Reuben stated that "Mr. O'Connor's report [was] in all relevant aspects correct,"; that Mr. O'Connor had no private interest in the subject matter of the commentary, as Mrs. O'Connor had indicated that she had "never sought, requested [or] desired the chairmanship of the IAC" nor did she in any way inspire or contribute to the broadcast in any way; that Mr. O'Connor's broadcast was not a personal attack; that "any steps necessary to satisfy fairness doctrine obligations are a matter for the reasonable judgment of" WMAQ–TV; and that WMAQ–TV "will insure, as always, that the fairness doctrine is at all times observed in a manner it determines is most appropriate pursuant to its public interest obligation."

When, during the presentation of views on a controversial issue of public importance, a licensee broadcasts an attack on the honesty, character, integrity or like personal qualities of an identified person or group, it is the duty of the licensee to notify the person or group attacked, to send a transcript or as accurate a summary as possible, and to afford a reasonable opportunity for a response. Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating: (1) the basis for the claim that the words broadcast constitute an attack upon the honesty, character, integrity or like personal qualities of an identified person or group; (2) the basis for the claim that a personal attack was broadcast during the presentation of views on a controversial issue of public importance; and (3) the basis for the claim that that which was discussed was a controversial issue of public importance at the time of the broadcast (complainant should include an accurate summary of the view or views presented and broadcast by the station).

As the Commission has stated:

> **In reviewing personal attack complaints, the Commission's function is not to substitute its judgment for that of the licensee, but to determine whether the licensee has acted reasonably and in good faith in arriving at its decision as to whether a personal attack has been made. *Sidney Willens and Russell Millin*, 33 FCC 2d 304 (1972).**

You have failed to show that the statements of which you complain were made during the discussion of a controversial issue of public importance. You state that the controversial issues of public importance being discussed were "whether the Governor . . . had dismantled the patronage system . . . and whether the appointment of Mr. Sagan as Chairman of the Arts Council was a proper or wise decision." Yet the only statements you made in support of your claim of the controversiality of these issues is the statement that the "Governor's treatment of the patronage system obviously is a controversial issue" because "the views of the Governor's supporters certainly differ from those of Mr. O'Connor" and the issue of patronage "was a subject of campaign debate prior to the most recent gubernatorial election" and that the "specific appointment of Mr. Sagan as Chairman of the Arts Council has been made controversial in the state by Mr. O'Connor."

A statement that an issue is "obviously controversial" because one undefined group may disagree with another or because it was the subject of an unspecified amount of debate during a past election campaign does not support a claim that the issue is a current contro-

versial issue of public importance. Further, the fact that an identified individual or group is attacked on the air does not make the issue of the attack a controversial issue of public importance. *In the Matter of Amendment of Part 73 of the Rules*, 8 FCC 2d 721 (1967).

Therefore, in the absence of more detailed and specific information to support your contention that the statements of which you complain were made during the discussion of a controversial issue of public importance, it cannot be said that WMAQ–TV was unreasonable in determining that no personal attack within the meaning of the Commission's Rules had taken place.

Assuming that the statements of which you complain were made during the discussion of a controversial issue of public importance, you have failed to show that they constituted an attack on the honesty, character, integrity, or like personal qualities of Mr. Sagan. The Commission has stated:

> Criticism of a public official's wisdom, judgment or actions it not necessarily an attack on his "honesty, character, integrity or like personal qualities," and we have stated that we shall not impose penalties in this area if the licensee could have had a reasonable doubt whether such an attack had taken place, or indeed in any case which does not involve a flagrant, clear cut violation. *Letter to WCMP Broadcasting Co.*, 41 FCC 2d 201 (1973).

The Commission has held that a charge that public officials had performed their functions "in a way that was most profitable to [themselves]" was not a personal attack within the Commission's Rules, saying:

> . . . [S]trong disagreement, even vehemently expressed, does not constitute a personal attack, in the absence of an attack upon character or integrity. *Port of New York Authority*, 25 FCC 2d 447.

The Commission has also held that "not all charges of illegality present attacks on honesty, character or integrity." *Rev. Paul E. Driscoll*, 40 FCC 2d 448 (1973). Therefore it cannot be said that WMAQ–TV was unreasonable in determining that the statements made did not constitute an attack on the honesty, character, integrity or like personal qualities of Mr. Sagan.

Insofar as the fairness doctrine may be concerned, if a station presents one side of a controversial issue of public importance, it must afford reasonable opportunity for the presentation of contrasting views. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine

whether the licensee can be said to have acted reasonably and in good faith.

Where complaint is made to the Commission, the Commission expects a complainant to submit specific information including: (1) the specific issue of a controversial nature of public importance broadcast (complainant should include an accurate summary of the views broadcast by the station); (2) the basis for the claim that the issue was a controversial issue of public importance at the time of the broadcast; (3) reasonable grounds for the claim that the station broadcast only one side of the issue in its overall programming; and (4) whether the station has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue.

In addition to having failed to show that the statements made constituted viewpoints on a controversial issue of public importance, as discussed above, you have not provided reasonable grounds for the claim that WMAQ–TV has broadcast only one side of the issue in its overall programming or that it has neither afforded nor expressed an intention to afford reasonable opportunity in its overall programming for the presentation of contrasting viewpoints.

Finally, with regard to your claim that Mr. O'Connor was allowing his private, non-broadcasting interests to influence his programming decisions without disclosing those private interests, the Commission has stated:

> . . . [T]he conflict of interest principle need not generally be extended to professional, personal, or business relationships which involve no element of financial gain or loss. *In re NBC*, 14 FCC 2d 713 (1968).

The Commission has applied its "conflict of interest principle" to personal political interests. *Letter to WCMP Broadcasting Co., supra.* In view of Mrs. O'Connor's disclaimer of any desire to hold the position of Chairman of the Arts Council, you have failed to show any such personal political interest on the part of Mr. O'Connor.

In view of the above, no Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

109–000—74——4

FCC 74-647

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KSAY BROADCASTING CO. (ASSIGNOR) AND SAN FRANCISCO WIRELESS TALKING MACHINE CO. (ASSIGNEE) For Commission Consent to Assignment of License for Radio Station KSAY-AM, San Francisco, Calif.	File No. BAL-7911

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 26, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS ABSTAINING FROM VOTING.

1. The above captioned application was accepted for filing June 28, 1973 and was granted by the Commission on February 13, 1974. The Memorandum Opinion and Order granting the application and denying a petition to deny filed by the Community Coalition for Media Change (hereinafter "CCMC") was released February 19, 1974 (FCC 74-161, 45 FCC 2d 348). Presently before us for consideration is (a) a petition filed March 15, 1974 by CCMC seeking reconsideration of that action;[1] (b) an opposition thereto filed March 4, 1974 by KSAY Broadcasting Co. (assignor) and San Francisco Wireless Talking Machine Company, Inc. (assignee); and (c) a reply to the opposition to the petition for reconsideration filed April 22, 1974 by CCMC.

2. CCMC petitions the Commission "to reconsider and reverse its action" in granting the subject assignment "on the grounds that the Commission has relied on erroneous conclusions of law and has ignored or mistreated the facts." Further, petitioner alleges that (1) the assignee does not possess the requisite character qualifications to hold a Commission license; (2) both the assignee and assignor have employment records which reflect discriminatory practices and (3) neither the past nor the proposed programming of either licensee "adequately serves the needs and interests of the people of San Francisco." The assignor and assignee oppose the petition for reconsideration, arguing that it is simply a "rehash of contentions" that have previously been presented to and disposed of by the Commission and that new

[1] Petitioner also requests in a Petition for Stay filed February 22, 1974, that the Commission stay its Order released February 19, 1974, so that the grant may be reconsidered. The grant of an assignment application will not be stayed pending action on a petition for reconsideration where the assignment has already been consummated (in this case consummated on February 22, 1974) and no irreparable injury is shown. On the matter of irreparable injury, Petitioner merely states that "It would be impossible to restore the status quo if the management and control of station KSAY changes hands." The Commission retains jurisdiction over the application until it acts on the petition for reconsideration and could therefore require restoration of the status quo. *Glyn J. Rice*, 36 FCC 2d 695 (1972) and *Desert Telecasting Co.*, 1 RR 2d 325 (1963).

matters, not previously presented to the Commission, have also been raised in the petition which is highly improper procedure at this time.

3. Petitioner contends that our Order granting the subject assignment "erroneously decided" the *ex parte* issues in the assignee's favor. Petitioner's contentions concerning *ex parte* rule violations are based upon its allegations that James J. Gabbert, President and controlling stockholder of assignee, informed Petitioner at a meeting on June 22, 1973 that he had shown the draft agreement which was presented to assignee by Petitioner to all of the FCC Commissioners, discussed its merits with them and that the Commission had expressed its displeasure with the agreement. Assignee in Opposition to the Petition to Deny did not refute that Gabbert had such meetings with the Commissioners, but instead stated that even if they did occur they would not have been prohibited *ex parte* presentations under Section 1.1203 of our rules because the proceeding did not become a "restricted" proceeding until the filing of the Petition more than a month later on July 27, 1973. In our Memorandum Opinion and Order we concluded that, whatever discussions between Mr. Gabbert and decision making personnel may have occurred, they could not have been *ex parte* presentation because the petition was not yet filed. Petitioner here repeats these allegations and maintains that the Commission's decision on this point is against the principles and policies set forth in *Ex Parte Communications*, 1 FCC 49, 50 (1965).

4. CCMC argues that while our *ex parte* rule characterizes application proceedings as "restrictive" from the day on which a petition to deny is filed (Section 1.1203(b)(1)), the Commission in adopting these rules (*In the Matter of Rules Governing Ex Parte Communications in Hearing Proceedings*, 1 FCC 2d 49 (1965)), did not want to restrict *ex parte* presentations solely to the specific language of the rule. That is, petitioners contend, it may become necessary to look beyond the technical limitations of the rule so that fairness would be achieved and the purpose of the rule would be upheld: to protect the "right of every person to get a decision on the merits." CCMC contends that its various meetings with the assignee before the subject application was filed (May 11, 23, June 22, 26, 1973), were conducted with the idea of apprising the assignee of the various actions it could follow to improve broadcast service to the community and not with the idea of coercing the assignee to meet unreasonable demands. Petitioner denies that it threatened assignee with a petition if its demands were not met, stating that "whatever Petitioner's intent, it is evident that assignee *believed* a petition would be filed if an agreement with the community group was not reached." Petitioner argues that "this firm belief is the crucial factor whether or not it was justified." Accordingly with such a belief, Petitioner reasons that Mr. Gabbert's alleged presentation to the Commissioners constituted *ex parte* rule violation even though the petition had not yet been filed. CCMC argues that the Commission wished to prohibit presentations if the moving person "had knowledge of matters which would warrant the classification of the proceeding as a restricted proceeding" at the time the communication is made. *Ex Parte Communications*, 1 FCC 2d at 50. Thus, in promulgating the *ex parte* rules, CCMC argues that the Commission

held that the situation now before us constituted precisely the type of communication it wished to prohibit:

> . . . although the proceeding is technically not yet restricted, presentations with the knowledge that a restricted proceeding is about to commence are unfair and threaten the right to a fair hearing on the merits. Pet. pp. 7–8.

Therefore, according to CCMC, the Commission's decision on the *ex parte* issue did not reflect a meaningful consideration of petitioner's allegations nor the "clear statement of policy announced simultaneously with the establishment of the *ex parte* rules." Such an intolerable precedent, CCMC points out, will prevent efforts by citizens groups to initiate dialogues with broadcasters before a petition is filed, for fear that their position would be jeopardized by "permissible" *ex parte* presentations by the licensee to Commission decision making personnel. Petitioner contends that to condone and sanction these licensee presentations would undercut the purpose of the *ex parte* rules and the Commission's policy of encouraging community dialogue.

5. Petitioner next contends that the assignee failed to deal in good faith with the public or CCMC as a responsible representative of the listening public in San Francisco. In support of this contention, Petitioner alleges that on May 23, 1973, CCMC and the assignee met to discuss a draft agreement and CCMC agreed to redraft the agreement in accordance with discussions at the meeting. However, between that date and June 22, 1973, when the revised agreement was presented to the assignee, James Gabbert allegedly discussed the draft agreement with Commission personnel. Petitioner maintains that this action by the assignee, if not in violation of *ex parte* rules, was surely "clear evidence of the assignee's total lack of good faith in dealing with the Coalition." Pet. p. 12. On June 22, 1973, Mr. Gabbert announced that he would not sign the revised agreement and at that meeting Marcus Wilcher, CCMC Director, sought a return of the revised agreement without success. According to petitioner a "scuffle erupted" over the document's return which resulted in the station manager locking the agreement in his desk and refusing to return it to Mr. Wilcher. Ultimately, petitioners state, a "copy" of the revised agreement was returned to CCMC.

6. Petitioner further alleges evidence of bad faith by the assignee following Commission grant of the assignment in that counsel for the assignee failed to apprise CCMC's counsel of the consummation date despite CCMC's telephone request to assignee's counsel for such information so that CCMC could determine whether to file for a stay *pendente lite*. Petitioner alleges that assignee's counsel never returned the telephone calls of its counsel on this matter. Petitioner contends that during this time representatives of assignee met and negotiated with Mr. Wilcher and that these meetings were "to give a semblance of cooperation when in fact, the parties were rushing to ram through the consummation." These actions, petitioners contend, evidence a "callous disregard for the public." Finally, petitioner alleges that the subject application was not on public file with either the assignee or the assignor as late as July 9, 1973 which is a clear violation of Section 1.526 of the Rules. Petitioner maintains that this absence from public

file provides a further indication of the parties' "complete lack of concern for its responsibilities towards its community."

7. In its Opposition assignee states with regard to the allegations of *ex parte* presentations in part as follows:

> Although it did not do so, and Petitioner's charges in this regard are false, KIOI would have been entirely free to make pre-Petition contacts with Commissioners and would have been fully justified in doing so in light of Petitioner's conduct and coercive demands.

The applicants respond that the *ex parte* rules were not applicable to the present situation since a petition to deny had yet to be filed and the policy arguments of CCMC have no bearing on the present fact situation. The applicants contend that the example in the Commission's Report and Order which is cited by Petitioner (viz. presentations "by a person who is planning to file a petition to deny or a mutually exclusive application . . .") is inapposite because in such a situation the moving party would know what he was going to do, know that he was in contest and know the merits of this filing, whereas assignee here had no such knowledge. Although it might be threatened with a petition, applicants question "how could [assignee] know whether this was a coercive tactic, a bluff or a reality?" or what such a Petition might contain or assert. Applicants also pose the question that if Petitioner's "list of demands or further 'draft' had been shown to the Commissioners . . . how could that possibly be prejudicial to anyone?" Also, the applicants note that petitioner cites no case, in support of their *ex parte* policy theory, while one case goes against their arguments: *Citizens Communications Center*, 23 RR 2d 428.

8. The applicants also contend that the arguments surrounding the CCMC-assignee negotiations have already been passed upon by the Commission and their restatement now is without point or merit. The assignee strongly disagrees with petitioner's account of the May 23, 1973 meeting—stating that the meeting was anything but a negotiation session; that assignee was not represented by counsel as claimed by CCMC; that assignee did nothing during the course of the meeting that would justify petitioner's assumption that a revised agreement would be acceptable if presented; and that petitioner's attitude was "rude and peremptory" in presenting their unreasonable and exorbitant demands. Assignee maintains that this attitude of the petitioner continued at the June 22, 1973 meeting and that petitioner at that meeting threatened "years of delay" on the assignment application if the revised agreement was not signed. The assignee continues by recounting its alleged efforts to enter into meaningful negotiations with CCMC before and after Commission grant of the application but petitioner "refused even to consider the proposal." Opp. p. 7.

9. The assignee points out that its counsel had no obligation to confer with petitioners counsel, but did so as a "matter of courtesy." The telephone call from CCMC's counsel "could only have been for the purpose of attempting to influence or interfere with the parties' actions" (Opp. p. 7) and given the time and expense already expended by the assignee as a result of petitioners' actions, the assignee argues that further discussions would have been senseless. Finally, the applicants

point out that there are no requirements that the subject assignment application be kept on file at KIOI–FM and the unsupported contention that it was not at KSAY–AM cannot be raised at this time. The assignee argues that petitioner obviously had no difficulty in gaining access to the application and filing its petition to deny.

10. Petitioner in its reply pleading contends that substantial and material questions of fact exist surrounding each party's perceptions and recollections of the incidents surrounding the May 23 and June 22, 1973 meetings. Accordingly, the petitioner urges that the opposition supports the need for an evidentiary hearing in which these factual issues could be resolved. CCMC finds that the *ex parte* issues raised have important implications for the future regarding negotiations between citizen groups and licensees. Therefore, petitioner urges us to reconsider our "erroneous interpretation of the *ex parte* rules as applied to this case." Petitioner argues that the Commission intended to prohibit not only communications on the part of prospective petitioners but also communications by licensees who know or believe a petition is imminent. There is no indication, according to petitioner, that the Commission intended this policy to be limited solely to prospective petitioners or competing applicants, for such an interpretation would be an unfair and uneven treatment of petitioners relative to licensees. CCMC alleges that while a licensee may not be certain that a petition will be filed against it; it is also true that a citizens group is often not certain of its intentions until the actual filing date—especially when negotiations are in progress. Petitioner maintains that *Citizens Communications Center, supra.*, cited and relied upon by the applicants, is inapposite, in that the case centered on a Freedom of Information Act request; the existence of *ex parte* contacts was not at issue. Petitioner points out that there the licensee conceded restricted communications with Commission personnel but characterized the conversations as general, informal and social, whereas here petitioner alleges that "Mr. Gabbert claimed that he spoke with the Commissioners about CCMC's negotiative demands . . ." Finally, petitioner states, even assuming that no pre-petition contacts were made by Mr. Gabbert, that a question is raised regarding the assignee's "attempted intimidation of CCMC during negotiations" through Mr. Gabbert's "falsely claiming" that such discussions had in fact occurred. Furthermore, petitioner contends that a valid question of fact does exist as to whether these illegal discussions did actually transpire.

11. Petitioner concludes that the assignee is without the requisite character qualifications to become a licensee of this agency due basically to *ex parte* rule violations and its lack of good faith in negotiations with CCMC. Petitioner's allegations on these points are repetitious of allegations raised and disposed of in the petition to deny. They are without merit and fail to raise substantial or material questions of fact. Initially, petitioner's arguments surrounding our *ex parte* policy are without basis in fact. Although assignee has denied making the alleged *ex parte* presentation, we are of the view that even if such presentations had occurred they would not be in violation of our *ex parte* rules since the time when they allegedly were made was more than a month prior

to the filing of the Petition to Deny. Our policy behind the *ex parte* rules was to prevent presentations

> if the person making the presentation has knowledge of matters which will warrant the classification of the proceeding as a restricted proceeding. Ex parte presentations should not be made, for example, by a person who is planning to file a petition to deny or a mutually exclusive application, if the same presentation would be prohibited after the petititon or application has been filed.

Report and Order on *Rules Governing Ex Parte Communications In Hearing Proceedings*, 1 FCC 2d 49, 52 (1965). Here petitioner erroneously concludes that "persons with knowledge of matters" includes persons like Mr. Gabbert who may have believed a petition to deny could be filed against him. Our Report and Order specifically points out, however, that a proceeding becomes restricted for purposes of the *ex parte* rules *only* when the person desiring to make communication has "actual knowledge of the filing of such a petition." 1 FCC 2d at 54. Without "actual knowledge" of the fact that a petition to deny has been filed, a person will not "be held accountable for the submission of an *ex parte* presentation concerning the restricted proceeding." *Ibid.* Accordingly, we find that the assignee failed to violate our *ex parte* rules since a petition had yet to be filed and therefore, the application proceeding was not "restricted" under our rules. Accordingly, whatever discussions may have taken place between Mr. Gabbert and Commission decision-making personnel prior to the filing of the Petition would not have violated our *Ex Parte* Rules. Thus, Petitioner's allegations and contentions concerning these matters fail to raise a substantial and material question which would require a hearing.

12. We turn now to petitioner's charges that assignee "negotiated in bad faith with the Coalition" and thus does not have the requisite character qualifications to obtain a Commission license. Petitioner suggests a hearing is necessary on this issue to resolve the conflicting perceptions of each participant based on the allegations contained in the pleadings. This Commission encourages a continuing dialogue between stations and community members as a means of devising ways to meet and fulfill ascertained community needs and interests. *Broadcast Procedure Manual* FCC 72–829. Here, there are conflicting versions of what took place at a meeting between the principals of the assignee and of the petitioner. We note that petitioner's allegations and recollections are without specific support of an affidavit of a person with personal knowledge of the events as they transpired. The assignee, on the other hand, has submitted an affidavit from its principals who were present at the meetings. In such a situation we are hardly persuaded that a substantial or material question of fact exists regarding the meetings of May 23 and June 22, 1973. *Chuck Stone* v. *FCC*, 466 F. 2d 316 (D.C. Cir. 1972). We have carefully considered all of petitioner's charges of bad faith and conclude that they raise no substantial and material questions of fact which would require a hearing.

EMPLOYMENT

13. Initially, CCMC contends that it, like the petitioners in *Bilingual Bicultural Coalition* v. *FCC* (D.C. Cir., No. 72–2205, decided February 13, 1974), were without effective "tools" necessary to delve behind the "obvious disparity between the minority population of San Francisco and the parties' employment records" in their efforts to make a prima facie case of equal employment rule violations. Without a hearing or other pre-hearing discovery procedures, CCMC argues that it was unable to urge the sufficiently specific allegations required by the Commission and accordingly, their allegations were as specific "as possible under the circumstances." Therefore, petitioners urge that the Commission's decision be reconsidered in light of the *Bilingual Bicultural* decision. Petitioner admits that the number of employees at KSAY–AM under the assignor "may have declined over the past two years" but fault the assignor for not showing affirmative efforts to fill these positions with minority persons [2] and argue that the assignor should not be allowed "to profit from its own wrongdoing by assigning its license to another." Pet. page 23. CCMC also concludes that the Commission erred in its decision that the assignee's employment program at KIOI–FM was satisfactory. Here petitioner again questions the assignee's good faith by alleging that additional minority personnel were hired only after CCMC had begun discussions with the assignee and only then did the assignee "upgrade" its personnel for it "feared its purchase of KSAY might be jeopardized." Additionally, petitioner contends that the assignee's affidavits on employment are misleading: one listed former Black male employee was only a part-time employee, a fact not mentioned; while Leora Johnson's title may have changed, she's still performing secretarial functions (see 45 FCC 2d at 352, note 5); and the Director of the Bay Area Broadcast Skills Bank told Mr. Wilcher that KIOI–FM made "very few contacts" with the bank and that none of the candidates referred were hired by KIOI–FM.

14. The applicants in their opposition argue that the employment issue has already been thoroughly explored by the Commission in its decision and correctly resolved. The arguments centering on the *Bilingual Bicultural* decision, the parties submit, give no support to petitioner since the basic decision of the case was adverse to petitioner's position and the generalized dicta could not be considered a mandate to the Commission to take any kind of affirmative action. Assignee has submitted an affidavit from Leora Johnson in which she states that she is Public Affairs Director at KSAY and is performing all public affairs duties for the station. The assignee maintains that it does not discriminate and that it has a superior equal employment program, that its employment policies are being continuously followed and that the repeated allegations of petitioner raises no valid point.

15. Petitioner is without examples of any person allegedly discriminated against because of race. The allegations that surround the

[2] Petitioner feels that the one offer made by the assignor to a Black female should have been made to another minority person when she declined the position. See 45 FCC 2d at 351.

job title or job responsibilities of Leora Johnson have been successfully rebutted by her affidavit. Mr. Wilcher's affidavit in contrast fails to raise substantial or material questions of fact. The approach taken by petitioner depends on statistical inference alone, their position being that the parties employ a non-proportional number of minorities and that those minorities who are employed primarily occupy lower paying positions. Our equal employment opportunity rules have at no time called for "fully proportional" employment of minority groups, since we do not believe that fair employment practices will necessarily result in such an employment record by a licensee. *Report and Order, Docket No. 18244*, 23 FCC 2d 430 (1970). Both the Commission and the courts upon review have followed this position that non-proportionate minority group employment at a station does not necessarily evidence discrimination requiring an evidentiary hearing. *The Evening News Association*, 35 FCC 2d 366 (1972); *Avco Broadcasting Corporation*, 9 FCC 2d 4 (1972) *affirmed sub. nom., The Bilingual Bicultural Coalition of Mass Media, Inc.* v. *FCC*, (D.C. Cir. 72–2205 decided February 13, 1974);[3] and *The Outlet Company*, 38 FCC 2d 355 (1972), *affirmed sub. nom., The Bilingual Bicultural Coalition of Mass Media, Inc.* v. *FCC*, Cir. Case No. 73–1001 February 22, 1974). The facts and statistics presented in this matter plainly demonstrate that the licensee's employment of minorities falls within a range of reasonableness and that the licensees have otherwise followed practices to improve the employment status of minorities.

16. We also find petitioner's objections to the hiring practices of the assignor and the assignee to be without merit. The assignor's efforts to hire minority personnel were reasonable and petitioner's suggestion that assignor should have taken additional efforts to hire a minority employee following its one rejection is tantamount to declaring that broadcasters must designate certain staff positions as open to minority group members only and would thus be wholly at variance with the goal of equal employment opportunity. In addition to being untimely in a petition for reconsideration, petitioner charges that the assignee "upgraded" its employment record raises no substantial or material questions which would require a hearing.

17. In summation, petitioner offers little information in its Petition for Reconsideration that has not been before us and amply covered in our Memorandum Opinion and Order which denied the Petition to Deny and granted the application. We find nothing that indicates that we should reverse our previous conclusions that a hearing is not required on either KSAY's or KIOI's employment practices. It should also be noted that the applications for renewal of licenses of Station KSAY and assignee's station KIOI are due to be filed on August 1, 1974. We will then be considering the equal employment practices at both of these stations and would, of course, give consideration to any material submitted by the Petitioner in connection with the renewal applications.

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[3] Petitioner relies upon dicta in the *Bilingual* decision wherein the court suggested that petitioners ought to be provided with "discovery" or other procedures so that they could properly determine the causes of non-proportional minority employment. In this regard it should be noted that the Commission's Industry Equal Employment Opportunity Unit is currently reviewing our equal employment opportunity policies and procedures to determine whether new or revised guidelines should be issued to further effectuate the goals of equal opportunity in employment for minorities and women.

PROGRAMING

18. Petitioner charges that neither the assignor nor the assignee "has dealt effectively with the social and racial problems of the community in their programming." Pet. page 26 Petitioner also alleges that the Commission in its decision "ignored the overriding specific complaint of the Coalition: that both parties to the assignment had the practice of airing all public affairs programming that allegedly dealt with community problems on Sunday." (Pet. page 26) Due to this latter scheduling practice, petitioner argues that the programming therefore failed to have a "meaningful" impact on the community. Petitioner contends that since most of KSAY's past programming was "ghettorized" to Sundays, the assignor should not be allowed to "benefit from its own wrong doing" through the assignment, even assuming that these Sunday programs met the needs of the community. The assignee's proposed programming fares no better according to CCMC due to the fact that "four or five" public affairs programs previously carried by the assignor will be eliminated by the assignee. Replacement programs will essentially be religious broadcast which petitioner believes will not improve communications between the races as claimed by the assignee.[4] Finally, petitioner contends that the assignee will be abusing its discretion by scheduling all public affairs programmings on Sundays only. In essence, petitioner argues that the assignee's proposed programming fails to meet community needs and interests in terms of either the type or timing of programs aired.

19. Again the parties charge that the allegations of the petitioner have been fully reviewed and disposed of by the Commission in its decision. The Petition to Deny concerned itself with the existing programming of KIOI–FM and KSAY–AM and "did not even question or challenge in any way the proposals in the assignment application" (Opp. page 10) and accordingly petitioner's arguments objecting to the assignee's proposed programming for KSAY–AM cannot now be aired. The assignee maintains that its proposals for KSAY are sound and in its judgment meet the needs and interests of the area. The petitioner's charge that the proposed programs will be "ghettorized" on Sunday is without merit for during this prime time period "substantially higher audiences" are listening (the assignee cites the ARB figure of 52,000 households). Assignee contends that the type of its public affairs programming and the time periods when broadcast will be a "most effective way to reach maximum audiences with information and discussion of community problems." (Opp. page 10).[5]

20. In our discussion of the programming issue in our previous Order (45 FCC 2d at 354), we noted that petitioners "substantially alleged general objections unsupported by specific instances of licensee failure to program in the public interest." The petitioner has accomplished no more in its petition for reconsideration; the allegations

[4] Petitioner alleges that the assignee in its Opposition to the Petition to Deny failed to make any showing as to how one of the proposed programs, "Glide Memorial Celebration," would meet the needs and interests of the community.

[5] The assignee points out that the proposed program "Glide Memorial Celebration", while based at a church, will effectively serve the needs and interests of the community given the widely oriented activities of the church into the social and human needs of the city and the interests and concerns for the city of its Pastor, Cecil Williams.

continue to be general in scope and without affidavit support. However, petitioner does concentrate now on the fact that public affairs programming will be broadcast on Sundays by the assignee at KSAY–AM and, according to petitoners, the impact of such programming will not be "meaningful." [6] The mere fact that the assignee has proposed public affairs programming on Sundays rather than on some other day, does not establish that a grant of the assignment application is prima facie inconsistent with the public interest. Proposed licensees must make good faith judgments in determining how and to what extent to deal with community problems needs and interests and this judgment is subject only to a reasonable limitations to preclude such possibilities as an applicant's presenting all broadcast matter to meet community problems between the hours, for example, of 2:00 a.m. and 4:00 a.m. when the audience may be almost non-existent. *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 679, 687 (1971). Here, the licensee has made a reasonable and good faith determination that its non-entertainment programming is more effective on Sunday. While petitioners may disagree with the assignee's judgment, as we have previously stated questions will not be raised about program scheduling decisions absent a specific showing that the assignee could not reasonably expect that the broadcast would be effective. *RadiOhio, Inc.*, 38 FCC 2d 721 (1971). The assignee's arguments in the opposition pleading regarding Sunday scheduling provides reasonable support for its proposals and without further persuasive arguments from petitioner we will conclude that the assignee's programming proposals have raised no substantial or material questions of fact that need for their resolution an administrative hearing.

21. Regarding petitioner's repeated allegations centering on the past programming of both the assignor and the assignee, we repeat our previous conclusion that the allegation of ultimate conclusory facts or mere general allegations on information and belief supported by general affidavit have been found to be insufficient to raise substantial and material questions of fact. *Chronicle Broadcasting Co.*, 27 RR 2d 1037 (1973). Again, the licensee is entrusted with wide discretion in determining the problems to be addressed by its station and in the choice of programming to meet those problems. *WGN of Colorado, Inc.*, 35 FCC 2d 789 (1972). Without a prima facie showing that the licensee has abused its discretion in either determining the problems to be met or in selecting the programs to meet community problems, no substantial or material question of fact is presented which would require a hearing. *Columbia Broadcasting System, Inc.*, FCC 74–378, released May 3, 1974. Such a prima facie showing should illustrate through affidavit that the licensee has failed to meet a substantial number of problems in its programming or that it refused in bad faith to meet a significant community problem. Such a showing has not

[6] The assignee is quite correct in objecting to CCMC's allegations surrounding the proposed public affairs programming for KSAY–AM since such arguments could have been raised in the petition to deny and consequently have no place or merit in a petition for reconsideration. (See Section 1.106(c) of the Commission's Rules).

been made by petitioner in either their petition to deny or their petition for reconsideration.

22. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by The Community Coalition for Media Change IS DENIED; That petitioner's Motion for Stay IS DISMISSED as moot; and our Memorandum Opinion and Order which granted the application of KSAY Broadcasting Co. to assign the license of Station KSAY–AM, San Francisco, California to San Francisco Wireless Talking Machine Co. is hereby AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-241

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MEDIA PROPERTIES, INC., BROWNSVILLE, TEX. For Construction Permit	Docket No. 19956 File No. BPH-8104

APPEARANCES

Jason L. Shrinsky and *Robert L. Olender* for Media Properties, Inc.; *Charles Dziedzic* for Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted June 26, 1974; Released July 3, 1974)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK AND KESSLER.

1. In an Initial Decision, FCC 74D-28, released May 14, 1974, Administrative Law Judge William Jensen proposes to deny the application of Media Properties, Inc. (Media) for a new FM broadcast station to operate on Channel 262 in Brownsville, Texas. Media is the sole remaining applicant in this proceeding,[1] and was found basically qualified in every respect by the Chief of the Broadcast Bureau, acting pursuant to delegated authority, in the designation Order, 39 FR 10015, published March 15, 1974. While conceding that "Media is qualified in every other pertinent respect to receive a grant of its application", the Judge proposes to deny Media's application because "the Commission's responsible officer [who the Judge does not identify] has filed neither a proper environmental impact statement, nor a proper statement of reasons as to why an environmental impact statement is unnecessary".[2] The proceeding is now before the Review Board on exceptions filed by Media and the Broadcast Bureau, who both challenge the Initial Decision and request its reversal.[3]

2. In the Board's opinion, the Judge clearly exceeded his authority in this case, leaving us no choice but to reverse the Initial Decision and grant Media's application. As Media and the Bureau point out, there are no outstanding issues in this proceeding under which the application can be denied. The only issues designated for hearing by

[1] The application of Valleywide Enterprises, Inc. for the same facilities was dismissed with prejudice by the Judge for failure to prosecute (FCC 74M-391, released April 9, 1974). Appropriate affidavits of no consideration were filed on April 25, 1974.

[2] To support his action, the Judge relies primarily on the following: (1) Section 102 (2)(C) of the National Environmental Policy Act of 1969 (N.E.P.A.), 42 U.S.C. § 4332 (2)(C); (2) *Arizona Public Service Co. v. Federal Power Commission*, —— U.S. App. D.C. ——, 483 F. 2d 1275 (1973); and (3) his own Initial Decision in the Albuquerque, New Mexico, proceeding in Docket No. 19178 (*Zia-Tele-Communications, Inc.*, FCC 74D-20, released March 19, 1974). Exceptions to the Albuquerque Initial Decision are presently pending before the Review Board.

[3] Also before the Board is a request for expedited consideration to prevent undue and unconscionable delay to Media Properties, Inc. for a construction permit in Brownsville, Texas, filed June 4, 1974, by Media. In view of our action herein, this request will be dismissed as moot. *Cf. Mid-Florida Television Corp.*, FCC 70R-286, 19 RR 2d 1013 (1970); *Central Coast Television (KCOY-TV)*, 11 FCC 2d 853, 12 RR 2d 596 (1968).

the Chief of the Broadcast Bureau are either inapplicable to Media or are comparative, *i.e.*, not disqualifying. There is no environmental impact issue. See 39 FR 10015, *supra*. There being no issue under which to disqualify the applicant, the Judge abused his authority by denying the application.[4] Simply stated, Media did not have adequate notice of the environmental impact question,[5] and the Judge's denial of its application on those grounds deprived it of the fair hearing to which it is entitled.

3. Insofar as the matter of environmental impact is concerned, the Board notes that the Commission has not yet adopted rules implementing applicable provisions of the National Environmental Policy Act, *supra* note 2. As we stated in *City of New York Municipal Broadcasting System* (*WNYC*), 39 FCC 2d 406, 26 RR 2d 920, 921 (1973), "the action taken by the Commission in issuing a Notice of Proposed Rule Making (*In the Matter of Implementation of the* [*National*] *Environmental Policy Act of 1969*, 36 FCC 2d 108 [1972]) to implement the provisions of the N.E.P.A. indicates that the addition of *ad hoc* issues would not be appropriate." [6] The Board therefore refused to add an environmental impact issue in that case. Furthermore, Judge Jensen has "cited no facts from which it might be inferred that [Media's proposal] could significantly affect the quality of the human environment." *City of New York Municipal Broadcasting System* (*WNYC*), *supra*.[7] Thus, there is no indication in the Initial Decision or elsewhere [8] that a grant of Media's application will affect at all, let alone "*significantly*" affect, "the quality of the human environment" (N.E.P.A., *supra* note 7). Likewise, the Commission has yet to specify the official who is responsible for preparing and filing the environmental impact statement (N.E.P.A., 42 U.S.C. § 4332). For the foregoing reasons, among others, we believe that the *Arizona Public Service Co.* case, *supra* note 2, upon which Judge Jensen relies to deny Media's application, is inapposite.[9] That being

[4] See Section 556 of the Administrative Procedure and Judicial Review Act, 5 U.S.C. § 556; and Sections 0.341 and 1.243 of the Commission's Rules. *Cf. Deep South Broadcasting Co.* v. *FCC*, 120 U.S. App. D.C. 365, 347 F. 2d 459, 4 RR 2d 2018 (1965).

[5] *Cf. Wilson & Co.* v. *FCC*, 335 F. 2d 788, 794–5 (7th Cir. 1964); *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, cert. denied 338 U.S. 860 (1949); *Brahy* v. *Federal Radio Commission*, 61 U.S. App. D.C. 204, 59 F. 2d 879 (1932); *Belk Broadcasting Co. of Florida, Inc.*, 27 FCC 2d 921, 21 RR 2d 351 (1971).

[6] The N.E.P.A. rule making proceeding (Docket No. 19555) is still pending before the Commission.

[7] The N.E.P.A. "directs that, *to the fullest extent possible* . . . all agencies of the Federal Government shall—* * * include in every recommendation or report on proposals for legislation and other *major* Federal actions *significantly* affecting the quality of the human environment, a detailed [environmental impact] statement by the responsible official. . . ." 42 U.S.C. § 4332(2)(C). (Emphasis added.)

[8] Since there was no hearing in this proceeding (see paragraph 7 of the Initial Decision), there is no record upon which to make proper findings and conclusions. In its brief in support of exceptions, Media contends that, as a matter of fact, its proposal would not adversely affect the environment. Various documents are submitted by Media in support of this argument.

[9] *Arizona Public Service Co.* v. *Federal Power Commission*, *supra*, was a natural gas certificate case involving another federal agency. Judge Jensen cites the case for the general proposition that the Federal Communications Commission, through its "responsible official", had to file an environmental impact statement in this case or state why one is unnecessary. By implication, Judge Jensen would apply this general principle to *all* broadcast actions of the Commission. We disagree with Judge Jensen's construction of the N.E.P.A. "There is no doubt that the [N.E.P.A.] contemplates some agency action that does not require an [environmental] impact statement because the action is minor and has so little effect on the environment as to be insignificant . . . [T]he two concepts [*i.e.*, 'major' federal action and 'significant' effect on the environment] are different and . . . the responsible federal agency has the authority to make its own threshold determination as to each in deciding whether an impact statement is necessary." *Hanly* v. *Mitchell*, 460 F. 2d 640, 644 (2d Cir. 1972). See *American Broadcasting Companies, Inc.*, —— FCC 2d ——, 30 RR 2d 6 (1974). *Cf. Carroll County Trails Association*, 28 FCC 2d 1013, 26 RR 2d 123 (1972). As noted above, Judge Jensen had no authority to raise the question of environmental impact on his own motion and there are no facts cited by the Judge to support the proposition in this particular case.

the case, the Judge's denial of Media's application cannot be sustained. Finally, the Board is not aware of any factual bases for specifying an issue on our own motion.[10] *Cf. City of New York Municipal Broadcasting System (WNYC), supra.* Compare *General Electric Cablevision Corp.*, 10 FCC 2d 198, 11 RR 2d 310 (1967).

4. In sum, we conclude that Media is qualified in every respect to be a Commission licensee and that a grant of its application would serve the public interest, convenience and necessity. Therefore, the Initial Decision will be reversed and Media's application will be granted.[11]

5. Accordingly, IT IS ORDERED, That the request for expedited consideration to prevent undue and unconscionable delay to Media Properties, Inc. for a construction permit in Brownsville, Texas, filed June 4, 1974, by Media Properties, Inc., IS DISMISSED; and

6. IT IS FURTHER ORDERED, That the exceptions of Media Properties, Inc., filed June 4, 1974, and the exceptions of the Chief, Broadcast Bureau, filed June 12, 1974, ARE GRANTED; and

7. IT IS FURTHER ORDERED, That the application of Media Properties, Inc. (File No. BPH–8104) for a new FM broadcast station to operate on Channel 262 at Brownsville, Texas, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER, *Member, Review Board.*

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[10] It is well established that the Review Board, unlike an Administrative Law Judge, has the authority to add issues on its own motion. See *Charles County Broadcasting Co., Inc.*, 25 RR 903, 906 (1963). See also *Athens Broadcasting Co., Inc.*, 37 FCC 2d 374, 388, 25 RR 2d 483, 500 (1972).

[11] There is no request for oral argument and the Board does not believe that one is necessary.

FCC 74D-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MEDIA PROPERTIES, INC., BROWNSVILLE, TEX. For Construction Permit	Docket No. 19956 File No. BPH-8104

APPEARANCES

Jason L. Shrinsky for Media Properties, Inc.; *Charles Dziedzic* for Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM JENSEN

(Issued May 10, 1974; Released May 14, 1974)

I. INTRODUCTION

1. By order released March 11, 1974 (Mimeo. No. 19302), Chief, Broadcast Bureau, pursuant to delegated authority, designated for hearing in a consolidated proceeding (a) the instant application of Media Properties, Inc.,[1] and (b) an application of Valleywide Enterprises, Inc., specifying the same city and channel. *Inter alia*, Chief, Broadcast Bureau found Media basically qualified in every particular; and, insofar as Media was concerned, the hearing issues set forth in the order were in terms only of standard comparison with Valleywide.

2. The undersigned Administrative Law Judge was assigned the case by order of the Chief Administrative Law Judge released March 12, 1974 (FCC 74M-262), the same order scheduling a prehearing conference for April 24, 1974, and a hearing commencing June 10, 1974.

3. By notice of appearance of March 20, 1974, Media, through counsel, stated that it would appear on the date fixed for hearing and present evidence on the specified hearing issues. See Rule 1.221(c). No such notice was filed on behalf of Valleywide within the twenty-day period specified by Rule 1.221(c); and by order released April 9, 1974 (FCC 74M-391), the Presiding Judge dismissed the Valleywide application with prejudice for failure to prosecute, the same order (a) dismissing as moot a Valleywide request for dismissal (of its own application) of April 3, 1974, and (b) noting that the request had not been accompanied by the affidavit (relating to the matter of receipt or promise of consideration in connection with the request) contemplated by Rule 1.525(c)(1) and (d)(1).

[1] Media would operate on FM Channel No. 262, with 100 kilowatts of power, and an antenna height of 449 feet.

II. THE PREHEARING CONFERENCE

4. The scheduled prehearing conference was duly convened on April 24, 1974, Media and Chief, Broadcast Bureau appearing through counsel, counsel for Media indicating that he had in his possession affidavits of no consideration proper under the rule next above.

5. Thereafter (Tr. 3–4), the Presiding Judge (a) called attention to the recent Initial Decision in the *Zia* case,[2] wherein there had been cited as independent grounds for denial of both FM applications there involved, the absence from that record of both a proper environmental impact statement, and a proper statement of reasons as to the lack of necessity therefor; and (b) stated an intention to hold to that position in the instant case in the absence of persuasive argument from either Media or Chief, Broadcast Bureau.

6. Both counsel argued with great sincerity and zeal, essentially to the ultimate effect (a) that—there being no environmental issue in the proceeding, and Media having been found qualified in all pertinent respects—Media was entitled to an immediate grant; and (b) that the Presiding Judge had no authority to inject into the hearing an issue of his own creation. The Presiding Judge responded that, as a general proposition, "Acts of Congress are always in issue" (Tr. 10), and that the Presiding Judge was "not advocating an issue", but "merely citing a case and an Act of Congress" (Tr. 14);[3] and further pointed out (a) that for Chief, Broadcast Bureau to advance the no-issue matter was pure bootstrap, he having specified the original hearing issues (Tr. 15–16), and (b) that it would be unlikely that an applicant would ever "petition for an issue under which [he] could conceivably be denied" (Tr. 10–11).[4]

7. Following pertinent inquiry by the Presiding Judge at Tr. 30, neither party suggested a purpose in formally convening a hearing session of any kind. And the prehearing conference concluded with the following statement of intent by the Presiding Judge at Tr. 35 (errors in the transcript corrected):

> I am not ordering either party in this connection. I will simply say this, that if I do not receive, or if there is not filed with the Secretary within 10 days from today—and if you want longer I will be glad to give it to you, but I simply took 10 days as reasonable—if there is not filed within 10 days from today with the Secretary a brief on the NEPA point, or some other document indicating that you will either (a) not file a brief, or (b) will file a brief but that you want additional time, then I propose to deny the application, and I will do it as quickly and with as much expedition as other duties will permit, and therefore you can get it to the Review Board as quickly as you can.[5]

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[2] *Zia Tele-Communications, Inc.*, FCC 74D–20, released March 19, 1974; order extending exception period to May 20, 1974, released April 19, 1974 (FCC 74R–144).

[3] The case was *Arizona Public Service Co.* v. *F.P.C.*, —— F.2d —— (CADC, 1973), Case No. 72–1636, decided July 30, 1973; the Act of Congress was the National Environmental Protection Act of 1969 (NEPA).

[4] In light of these considerations, it seems clear that, until the Commission completes its deliberations in Docket No. 19555 (Implementation of the National Environmental Policy Act of 1969), NEPA issues stand no chance of being advocated in particular cases in the absence of third-party intervenors. In fairness here to Media, it is noted that no such intervenor materialized in this case notwithstanding that Media effected local notice of the designation of its application for hearing as contemplated by Rule 1.594. See, in this connection, Media's statement of May 9, 1974.

[5] The matter of the requirement that Media submit the no-consideration affidavits in its possession was also referred to at Tr. 35.

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III. A SUBSEQUENT PLEADING

8. The only response to the foregoing statement was a letter of April 25, 1974, from Media counsel (a) enclosing the affidavits of no consideration above referred to,[6] and (b) requesting "an Initial Decision granting the Media . . . application consistent with the dictates of the public interest and the mandate of Section 307(b) of the Communications Act of 1934, as amended." [7]

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

IV. DISCUSSION

9. Insofar as "the dictates of the public interest" are concerned, the Presiding Judge stands on the position taken in *Zia*, and believes that the Media application must be denied because there has not been filed in this proceeding, by the responsible Commission officer, either (a) an environmental impact statement or (b) a statement of reasons as to why such an impact statement is unnecessary.

10. Media's reference to Section 307(b) of the Communications Act contracts the fuller position taken by Media on this point at Tr. 23–24:

> Another brief point that I think we run afoul of if we get into the aspect of the ionosphere, and so forth, and kilowatt hours, is we could debate Section 307(b) probably within our natural lives. 307(b) speaks to a fair distribution of broadcasting facilities among the people.
>
> I do not know if you have ever taken the time to locate Brownsville, Texas, but it is a vast territory that right now is underserved. The reason I say it is underserved is the Commission has just allocated and has freed from Mexico three FM channels to work in that community because there is not a plethora of broadcast service available to it. As a consequence, we get into a very deep 307(b) consideration. Why should I living in Brownsville have to listen to radio in Arlington or MacCallum, or from across the border? Are my basic civil rights being violated?

11. The short answer to Media's 307(b) argument is that while the factual matters asserted could be valid points in attempting to counter any findings in the proceeding as to adverse impact on the environment, this record is totally lacking in the impact evidence essential to a weighing or balancing process; and this deficiency will remain until such time as the Commission's responsible officer seeks to comply with the NEPA mandate.

12. The Presiding Judge is not without empathy here for Media and the circumstances in which it now finds itself. Counsel for Media addressed himself to these circumstances at Tr. 36 as follows:

> . . . It will be at least a year before it is heard before the Review Board, it will be another six months before a decision is reached, and what can I say?

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[6] The affidavits—the one by Valleywide's Executive Vice President, and the other by his Media counterpart—establish that consideration from Media was not involved in Valleywide's request for dismissal.

[7] 47 U.S.C. § 307(b) reads as follows:

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Eighteen months to find out whether you were right or wrong on an issue that is not in this proceeding?

I am just so troubled by it. We are talking about lives, we are talking about 1½ years and there is nothing I can do. All you are saying is, "Mr. Shrinsky, there is not a damn thing you can do. You can brief it, you can submit."

But it goes well beyond that, and how do I explain that to my client? How do I explain that to the people at Brownsville, saying they are not getting a radio station?

The Presiding Judge has ruminated the matter of how this Initial Decision's adverse impact on Media might be held to a minimum should it ultimately prove that the NEPA disposition herein effected is inconsistent with pertinent authority.[8] One thought has been to recommend that Media seek limited consolidation of this proceeding with the *Zia* case, with the further plea that Media (and its single "issue") be spun off from *Zia* immediately following oral argument for a prompt Review Board Decision.[9] The problems with this and any analogous recommendations, however, are that (a) they tend to an appearance of a Presiding Judge seeking to dictate to the Review Board how best to procedurally deal with the various matters before it, and (b) the Review Board's total workload and priorities established with respect thereto might be such as to project for *Zia* a time frame of the magnitude anticipated by Media for the present case.

13. A second thought has been that this case might be a proper one for Certification directly to the Review Board pursuant to Rule 0.341 (c). However, apart from the fact that Certification might not be totally proper where (a) the Presiding Judge has an announced and unclouded view as to the matter involved in the Certification, and (b) the question to be certified is already before the Review Board in another case, there would still remain the practical question of whether the Review Board is in a position to assign higher priorities to certified matters than it does to its cases arriving there by more normal means.

14. A final (and persuasive) thought has been to stay out of the review matter to the greatest practicable extent, and leave the parties and their counsel to their own devices in seeking to effectively petition the Review Board for expeditious consideration of this case. However, in connection with any such petition—and notwithstanding the negative thrusts of the two previous paragraphs—should it serve either party's (and a receptive Review Board's) purposes to treat this Initial Decision as a Rule 0.341(c) Certification, the Presiding Judge has no objection to that approach.

V. ULTIMATE FINDINGS AND CONCLUSIONS

15. No evidentiary or other constructive purpose would be served by convening the hearing presently scheduled to commence herein on June 10, 1974; accordingly, the hearing should be cancelled and the record herein closed.

16. Although the Media application, upon designation for hearing, was in conflict with a mutually exclusive application filed by Valley-

[8] At Tr. 27–28, it was recognized that the Presiding Judge—as did the cheese in the nursery rhyme—might ultimately stand alone in the matter.

[9] The *Zia* case is presently before the Review Board in that exceptions from all parties to the case (including Chief, Broadcast Bureau) may logically be expected on or before May 20, 1974. See note 2, *supra*.

wide Enterprises, Inc. (Docket No. 19957, File No. BPH-8239), a subsequent removal of the conflict did not involve consideration from Media.

17. Although Media is qualified in every other pertinent respect to receive a grant of its application, the Commission's responsible officer has filed neither a proper environmental impact statement, nor a proper statement of reasons as to why an environmental impact statement is unnecessary; accordingly, a grant of the Media application would not serve the public interest, convenience and necessity, and that application must be denied.

VI. ORDER

18. Wherefore, IT IS ORDERED,

That the hearing herein, presently scheduled to commence on June 10, 1974, IS CANCELLED;

That the record in this proceeding IS CLOSED; and

That the application of Media Properties, Inc., filed October 4, 1972, for a construction permit for a new FM broadcast station to be operated on FM Channel No. 262, at Brownsville, Texas, IS DENIED.[10]

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM JENSEN, *Administrative Law Judge.*

[10] In the absence of exceptions, appeal or review, this Initial Decision will become effective 50 days after the release date appearing on the first page hereof. See §§ 1.267(b) and 1.276 (a) and (b) of the Commission's Rules.

FCC 74-643

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of ORANGE CABLEVISION, INC., UNINCORPORATED AREA OF ORANGE COUNTY, FLA. For Certificate of Compliance	CAC-1344 FL252

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 27, 1974)

BY THE COMMISSION:

1. Orange Cablevision, Inc., has filed the above-captioned application to commence cable television service in the unincorporated area of Orange County, Florida (pop. 195,747), which is located in the Orlando-Daytona Beach, Florida, major television market (#55). Cablevision's system will be constructed with a 24-channel capacity and proposes to offer its subscribers the following television broadcast signals:

WESH-TV (NBC, Channel 2), Daytona Beach, Florida
WDBO-TV (CBS, Channel 6), Orlando, Florida
WFTV (ABC, Channel 9), Orlando, Florida
WMFE-TV (Educ., Channel 24), Orlando, Florida
WSWB-TV (Ind., Channel 35), Orlando, Florida
WTOG (Ind., Channel 44), St. Petersburg, Florida
WCIX-TV (Ind., Channel 6), Miami, Florida
WLTV (Span. Lang., Channel 23), Miami, Florida
WEDU (Educ., Channel 3), Tampa, Florida
WUSF-TV (Educ., Channel 16), Tampa, Florida

Carriage of the above-listed signals is consistent with the Commission's Rules. The application is unopposed.

2. Cablevision's franchise was granted on August 15, 1972, and accordingly, full compliance with the standards of Section 76.31 of the Rules is required. The franchise incorporates by reference and was issued subject to the provisions of Orange County Ordinance 71-7, as amended, and the proposals of Cablevision as set forth in its franchise bid submitted to the county on March 16, 1972. The bid sets forth the legal, character, financial, technical, and other qualifications of the applicant, as well as its construction arrangements, all of which were, according to Cablevision, approved by Orange County after full public proceedings affording due process. The bid and county ordinance contain adequate provisions regarding a construction schedule. The franchise is for a duration of 15 years. Initial rates have been approved by the county, and any changes require approval by the Board, which Cablevision assures us would take place after a public proceeding. The

county ordinance requires Cablevision to maintain a local business office and specify procedures for the investigation and resolution of complaints. The ordinance states that the franchise shall be subject to all requirements of pertinent federal rules and regulations, a provision we interpret to be in compliance with Section 76.31(a)(6) of the Rules.

3. The difficulty with Cablevision's franchise concerns compliance with Section 76.31(b) of the Rules dealing with franchise fees.[1] The county ordinance specifies a range of 3–5 percent of the franchisee's gross subscriber revenues per year, and in its application, Cablevision proposes 5 percent of its gross subscriber revenues. However, Cablevision's bid to Orange County contains a payment schedule[2] which indicates that the payment could possibly be greater than 5 percent of gross revenues.[3] Because the terms of Cablevision's bid have been incorporated into its franchise, it is not clear exactly what amount Orange County requires as a franchise fee. Clarification of this issue is required before we are able to determine Cablevision's compliance with Section 76.31(b).

4. Additionally, we note that Cablevision has already made a lump sum payment of $330,000 to Orange County in addition to the $10,000 deposit accompanying its application. Although Section 76.31(b) of the Rules does not expressly prohibit franchise fees to take the form of lump sum payments, we are concerned that payments such as the one in this case might impose severe burdens on new cable television systems and might possibly hinder the development of cable television systems in many areas of the country. The capital costs involved in building a cable television system are great. Headend and production facilities, cable distribution plants, subscriber equipment, as well as salaries, legel fees, and other organizational expenses are all part of

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[1] Section 76.31(b) provides in pertinent part:
"The franchise fee shall be reasonable (e.g., in the range of 3–5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds 3 percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program . . . ."

[2] Cablevision's bid contains the following payment schedule:
a. a prepayment in the amount of $165,000
b. first year $25,000
c. second through fifth years $140,000
d. sixth through tenth years $375,000
e. eleventh through fifteenth years $500,000
The above amounts are considered to be a net cash guarantee which will be considered to be a minimum payment to the county based on a percentage figure of 5 percent for each of the 15 years. The County is to receive the payment based on 5 percent of all gross revenues or the minimum payment, whichever shall be greater.

[3] In Cablevision's bid, gross revenues are defined as "any revenues generated from installation fees, subscriber fees, leased channels, advertising revenues, and any other additional services provided in the franchise area for which a charge is made by the cable television system", a provision which clearly conflicts with the Commission's requirement of "gross subscriber revenues" in Section 76.31(b) of the Rules and the definition of "gross subscriber revenues" found in paragraph 95 of the *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, FCC 74–384, 46 FCC 2d 175, 202 (1974), which reads as follows:
"The term 'gross subscriber revenues' is meant to include only those revenues derived from the supplying of regular subscriber service, that is, the installation fees, disconnect and reconnect fees, and fees for regular cable benefits including the transmission of broadcast signals and access and origination channels if any. It does not include revenues derived from per-program or per-channel charges, leased channel revenues, advertising revenues, or any other income derived from the system."

the initial costs which must be incurred. Where a franchise requires a lump sum prepayment, the effect is likely to deprive a potential system operator of those funds needed for the initial capital investment required to build the cable system. In addition, because of the high costs of borrowing money, such a lump sum requirement favors those groups with immediate access to large sums of money. As a result, local and/or minority groups unable to raise the required cash payment may be prohibited from seeking franchises to develop cable television in their respective communities. Lump sum prepayments may also inhibit the smooth functioning of a franchising authority's planned regulatory program. For example, where a payment is made to cover the first five years of a system's operations, there is no assurance that sufficient funds will be available in the fourth or fifth year to enable a local authority to maintain its regulatory program as envisioned by the Commission. The danger that the lump sum payment will have been exhausted is apparent. In brief, we are not convinced that lump sum prepayments operate in the public interest. *See Clarification, supra*, para. 107.

5. The 5 percent figure set forth by Cablevision in its application raises still another question under Section 76.31(b) of the Rules. That section requires showings by (a) the franchisee, that the proposed fee "will not interfere with the effectuation of federal regulatory goals in the field of cable television; and (b) the franchising authority, "that it is appropriate in light of the planned local regulatory program." In support of (a) above, Cablevision assures us "on the basis of detailed market studies and financial projections" that the 5 percent fee will not interfere with its ability to meet the Commission's regulatory goals. Cablevision's financial projections are set forth in its bid to Orange County and indicate that sufficient revenues will be available during the first five years of operations to enable it to provide local origination, access, and other services, as required by the Rules. With regard to (b) above, there has been no showing by the franchising authority. In its application, Cablevision undertakes to make the required showing "with the approval and support of the franchising authority." The showing consists of the population figures of Orange County and a description of the administrative duties of various departments of Orange County in the cable television area. We do not consider this showing to be adequate. In a recent case proposing a similar 5 percent franchise fee, we stated that "the intent of the showing required by Section 76.31(b) is to elicit specific information as to how the required franchise fee will be expended on the proposed regulatory program" *Total Communications of Irving, Inc.*, FCC 74–157, 45 FCC 2d 525 (1974). Information such as the number of people who will be assigned regulatory duties, the type of duties to be performed and the projected cost of performing those duties is necessary in order for us to determine the appropriateness of a 5 percent franchise fee. *See WKBC Cablevision, Inc.*, FCC 74–94, 45 FCC 2d 237 (1974); *A. N. Cable TV Co., Inc.*, FCC 73–830, 42 FCC 2d 291 (1973). We find that neither Cablevision nor the franchising authority has made the proper showing as required by the Rules to justify its

proposed 5 percent franchise fee. *See also Hawkeye Cablevision, Inc.*, FCC 74–434, —— FCC 2d —— (released April 30, 1974); *General Television of Minnesota, Inc.*, FCC 74–518, —— FCC 2d —— (released May 29, 1974).

6. In Cablevision's bid to Orange County, which is incorporated by reference into its franchise, and in its application for certificate of compliance, Cablevision proposes to provide two educational access channels. The reasons for this proposal are the size of the county and the fact that only one school system serves both the incorporated and unincorporated areas of the county.[4] Cablevision proposes to have one channnel utilized by the elementary schools and one by the secondary schools, subject to approval by the county board. In addition, the proposed system design contains interconnection features which will permit each school in the public school system to be linked to every other school on a bi-directional simplex basis.

7. Section 76.251(a)(5) requires a cable system to provide "at least" one specially designated educational access channel. In paragraph 132 of *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 193 (1972), we expressed a willingness to consider a system's request for additional access channels beyond the requirements of the Rules. Again, in paragraph 81 of the *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 355 (1972), we noted that one educational access channel is the minimum required and that we envisioned an orderly growth of access channels linked to demand. However, consistent with our discussion of this matter in paragraph 25 of the *Clarification*, *supra*, n. 1, we would need a further showing by Cablevision before granting such a request.[5]

8. Because our denial of the application is based upon our conclusion that the submitted franchise does not achieve the required degree of conformity with Section 76.31, our action today will be without prejudice to its reconsideration in connection with the submission of an amended franchise or a more persuasive showing that is consistent with Section 76.31. *See Community Television, Inc.*, FCC 73–1208, 43 FCC 2d 1090 (1973); *Leacom, Inc.*, FCC 73–292, 40 FCC 2d 129, *recons. granted*, FCC 73–412, 40 FCC 2d 693 (1973).

In view of the foregoing, the Commission finds that a grant of the above-captioned application would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–1344), filed by Orange Cablevision, Inc., IS DENIED, without prejudice to further proceedings consistent with paragraph 8 above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[4] The county school system contains 70 elementary schools, 17 junior high schools, and 10 high schools. In the unincorporated area of the county, there are 48 separate schools at the three levels.

[5] Paragraph 25 reads in pertinent part:
". . . any proposals in franchises requiring access channels or facilities in excess of what is required in our rules must be shown to be reasonable and necessary for a planned local program of use. A showing in the application for a certificate of compliance must be made that indicates what the nature of the added requirement is, how it will be implemented, who will pay for the extra services and equipment, how much they will cost, and how the costs, if borne by the cable operator, will add to rather than detract from his overall service offering."

FCC No. 74-658

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
THE PACIFIC TELEPHONE AND TELEGRAPH CO. FOR ASSIGNMENT OF AN ADDITIONAL WORKING FREQUENCY (161.8 MHz) TO PUBLIC COAST STATION KMB 393 AT AVALON, CATALINA ISLAND, CALIF.

MEMORANDUM OPINION AND ORDER

(Adopted June 25, 1974; Released June 27, 1974)

BY THE COMMISSION:

1. The Pacific Telephone and Telegraph Company (PT&T) has filed an application (File No. 14-M-ML-113) for assignment of a second working frequency for Public Coast (Class III-B) radio station KMB-393, located at Avalon, Catalina Island, California. The application is authorized by Section 81.303(b)(22)(ii) of the Commission's rules. That Section provides, essentially, that an additional working frequency may be assigned to this class of station when the assigned frequency, or frequencies, are at least 40% occupied at the times specified in the rule section. The application includes a showing that the channel occupancy on the assigned working frequency at the subject station exceeds the percentage specified in the rule section. The application, therefore, *prima facie*, meets the rule requirements for the assignment of an additional working frequency and would ordinarily be routinely granted.

2. Two Petitions to Deny the subject application, however, have been filed, one by R. L. Mohr d/b/a Radiocall Corp., (Radiocall) and the other by Dana Point Marine Telephone Company (Dana Point). Both petitions were timely filed.[1] Additionally, the applicant has filed a response to the Petitions to Deny, and Radiocall has filed an answer to the response. The petitioners state they operate VHF (very high frequency) public coast stations in the same general area as the applicant and compete to provide maritime public correspondence service. Both petitioners present essentially the same substantive arguments against the grant of the pending application; i.e., that the grant of the pending application would not be in the public interest because it would cause petitioners economic injury. The petitioners further state

[1] There is some dispute contained in the filings of the parties herein, with respect to the timeliness of the filing of the Dana Point Petition. Although the Petition was filed one day later than the 30 days allowed by the Commission's rules, petitioner states that an additional day to file was granted by the Commission Secretary, orally by phone, when a Washington, D.C. area snowstorm resulted in the early closing of the Commission's offices on the last allowable day for filing the petition. We resolve this dispute in petitioner's favor, and conclude that under those circumstances, good cause existed for granting an extension of time within which to file the petition, and we hereby grant that extension of time.

that the applicant is the landline common carrier for the area where all the involved coast stations are located, that petitioners operate no landwire facilities, and that there is no landwire toll charges for uncompleted shore-to-ship calls routed through the applicant's station, whereas there are landline toll charges for such calls routed through petitioners' stations. The petitioners say that this constitutes an unfair economic advantage in favor of public coast stations licensed to and operated by landline common carriers generally and to the applicant specifically. Petitioners also say that this matter and certain other operational practices is the subject of action before the California Public Utilities Commission and has also been discussed in meetings with officials of the two major California landwire carriers and other interested government and private parties. The petitioners assert they have standing under *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, and that the Commission through its licensing power may insure an equitable competitive climate between landwire carriers and the nonlandwire carriers as demonstrated in the guardband proceeding in Docket 16778.[2] The applicant asserts that the question of an alleged imbalance in the competitive positions of the parties, has no bearing on the propriety of its application.

3. We agree with petitioners' claim that they have standing in this proceeding, and we accordingly find them Parties in Interest.

4. With respect to petitioners' claim that the described practice involving landwire toll charges for uncompleted calls routed through their public coast stations, as compared to the absence of such charges for these calls routed through applicant's public coast station constitutes an unfair economic advantage in favor of the applicant, we agree there may be merit in this argument. In paragraph 15 of our Report and Order in Docket No. 16778, we recognized that a comparable situation with respect to the operation of paging systems by wireline carriers and non-wireline carriers could result in an unfair competitive practice. To prevent that from happening, we required that a wireline carrier using the frequencies involved in that proceeding for paging services, licensed in the Domestic Public Land Mobile Radio Services, to non-wireline carriers, fix its charges for its landline facilities on the identical basis it uses to compute its own costs in connection with those services that it provides. We took that action, however, in a rule making proceeding with full public notice and adequate opportunity for the public and all interested parties to participate by filing comments or otherwise participate in the proceeding. It may be that comparable action should be taken for public coast stations in the circumstances existing here, and a similar rule requirement may be needed with respect to the operation of public coast stations in the Maritime Mobile Services. We do not believe, however, than an application proceeding is the proper administrative vehicle for exploring this matter or for determining the need for, or nature of, any remedial rule making or other corrective action. To this extent we agree in substance with

[2] Docket No. 16778 was an extensive and somewhat complex rule making proceeding that was initiated on July 20, 1966, with a Notice of Inquiry. It involved, in the 150.8–162 MHz band, allocation of unassignable spectrum in the Domestic Public Land Mobile Radio Service by adjustment of certain of the band edges. In a Report and Order, in that Docket (FCC 68–515, 12 FCC 2d 841), released May 13, 1968, the Commission amended Part 21 of its rules *inter alia* assigning under certain specified conditions separate frequencies to wireline and non-wireline carriers to use for one-way signaling.

the applicant's position of this economic competitive question and conclude that the question is not sufficiently germane, or related, to the pending application of Pacific Telephone which is otherwise in compliance with our rules and in good order for grant.

5. In view of the foregoing, we will deny and dismiss the Petitions to Deny the application of PT&T for an additional working frequency for its maritime mobile public coast radio station at Avalon, but we will keep under study the conflicting charge practices of wireline carriers, as described in the Petitions to Deny. Petitioners or any other interested parties may, of course, petition this Commission to initiate rule making proceedings to provide economic relief to non-wireline carriers that operate maritime public coast stations.

6. Accordingly, IT IS ORDERED, That the Petitions to Deny filed by Dana Point and Radiocall, ARE DENIED AND DISMISSED.

7. IT IS FURTHER ORDERED, That the application of Pacific Telephone for an additional working frequency for Public Coast Station KMB 393 at Avalon, California, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-637

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RADIO DISPATCH CORP., POMONA, CALIF.	Docket No. 20084 File No. 3322-C2-P-70
MOBILFONE, INC., LOS ANGELES, CALIF.	Docket No. 20085 File No. 3514-C2-P-(3)-70
INDUSTRIAL COMMUNICATIONS SYSTEMS, INC., LOS ANGELES, CALIF.	Docket No. 20086 File No. 4611-C2-P-(4)-70

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 28, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration applications filed on December 4, 1969, by Pomona Radio Dispatch Corporation (now Radio Dispatch Corporation, hereinafter RDC), December 18, 1969 by Mobilefone, Inc. (Mobilefone), and February 13, 1970 and December 28, 1970 by Industrial Communications Systems, Inc. (Industrial). The applications are for new or additional facilities to be operated in the Domestic Public Land Mobile Radio Service (DPLMRS) in the Los Angeles, California Area. Also before the Commission are: (a) Petition of RDC to deny the application of Industrial, received March 26, 1970; (b) Opposition of Industrial to petition to dismiss application, received April 17, 1970; (c) Reply to opposition to petition to dismiss application by RDC, received May 14, 1970; (d) Petitions of RDC and Intrastate Radio Telephone, Inc. of Los Angeles (Intrastate) to deny the application of Industrial both received March 1, 1971; (e) Opposition of Industrial to petition to dismiss applications received March 12, 1971; (f) Reply of Intrastate to opposition of Industrial received March 22, 1971.

2. The RDC application is for a construction permit for additional facilities at its station KMD 992 to be operated on the frequency 454.125 MHz. The Mobilefone application is for additional facilities at its Station KMA 253 to be operated on the base station frequency 454.075 MHz. The Industrial application filed February 13, 1970 is for additional facilities at its station KMD 990 to be operated on the base frequencies 454.075 MHz and 455.125 MHz. On December 28, 1970 Industrial filed an application for additional facilities for its station KMD 990 to be operated on the frequency 152.18 MHz. The applications are mutually exclusive because a grant of all would result in

mutually harmful electrical interference.[1] A hearing is therefore necessary to determine what disposition of the conflicting applications would best serve the public interest. *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). While the RDC (454.125 MHz) and Mobilefone (454.075 MHz) applications are not mutually electrically exclusive, each is exclusive with the Industrial application of February 13, 1970 (454.075 MHz and 454.125 MHz) and we have determined that the public interest would best be served by consideration of all the applications in one hearing.

3. The first applicant, RDC, is presently the licensee of station KMD 992 operating in the DPLMRS at Pomona, California. It seeks to add a second channel (454.125 MHz) to enable it to expand the reliable coverage area of its local calling exchange service. In addition it seeks: (1) to add a new transmitter and antenna moving from its present location in downtown Pomona to a location in Kellogg Hills near Puddingstone Reservoir in Los Angeles County; and (2) to install a transmitter and antenna at a new location on Sunset Ridge located north of the City of Pomona in the foothills of the San Gabriel Mountains. RDC estimates the total cost of its proposed facilities to be $7,100. On August 26, 1969 the California Public Utilities Commission authorized Pomona Radio Dispatch (RDC's predecessor) to serve the proposed area, to move its Pomona transmitter to Kellogg Hills and to establish a new transmitter at Sunset Ridge.[2] The California Commission found that the service presently being offered by RDC was inadequate to serve present and future needs and that the changes would enable RDC to offer reliable local calling exchange service to subscribers in the east San Gabriel Valley—Pomona Valley— west San Bernardino County area. On September 17, 1973, in response to a Commission staff request,[3] RDC submitted additional information regarding its application. The RDC reply contained *inter alia* a statement that one Carl B. Hilliard had "personally committed" his financial resources to support construction and operation of the proposed facilities. The submission included current financial statements for RDC and Mr. and Mrs. Carl B. Hilliard along with additional allegations regarding the need for RDC's proposed service. The reply did not contain the information requested regarding the basis on which the commitment of Hilliard funds was made. No written instruments reflecting such an agreement were furnished. In the interest of time the Commission will not direct further requests to RDC but will consider its financial qualifications in the hearing on its application.

4. The second applicant, Mobilefone, is a California corporation which presently operates stations KMA 253 and KMB 309 in the DPLMRS near Los Angeles, California. It wishes to make the following changes in its station KMA 253: (a) add a frequency (454.075 MHz-base station) and a new transmitter at its existing antenna loca-

[1] As set forth in paragraph 7 of the order, the Industrial application for 152.18 MHz will not be considered in this proceeding.
[2] CPUC Decision No. 76097, August 26, 1969, Rehearing denied Decision No. 76359, Nov. 4, 1969.
[3] Letter dated July 17, 1973 from Chief, Domestic Radio Division for Chief, Common Carrier Bureau.

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tion #5 (San Pedro Hills); (b) add a frequency (454.075 MHz—base station) and a new transmitter at its existing antenna location #6 (La Habra Heights); and (c) add a new frequency (454.075 MHz—base station) and a transmitter at a new location (#7—Oat Mountain). The estimated cost of the proposed additions is $1,376. The rather low projected costs are justified by Mobilefone in that transmitter locations #5 and #6 are already in use and operating under licenses for KMA 253 and KMB 309. At location #7 the antenna supporting structure and equipment building are already in place and Mobilefone states that it has only to install an antenna and transmission line before beginning operation. Considering the cost we find Mobilefone to be financially qualified to build and operate the facilities proposed in its application. Mobilefone proposes to use the new frequency for two-way manual radio telephone and two way dial automatic service. The new location (#7—Oat Mountain) is needed to improve its service in the Newhall, Thousand Oaks and Simi areas. On February 3, 1970 the Commission received a letter from Intrastate stating that the area Mobilefone proposed to serve from its new Oat Mountain transmitter site exceeded by an unspecified amount the area for which it held a certificate of public convenience and necessity from the California Public Utilities Commission.[4] Mobilefone took the position[5] that the area to be served from Oat Mountain was within the service contour presently authorized for the operations of KMA 253. The issue of the precise limits of the service area granted to a DPLMRS carrier by a state regulatory commission should be presented to that regulatory commission. Because there is no indication that this has been done and because the Intrastate objection has been withdrawn[6] we shall not consider the question here. On April 2, 1970 the Commission received from Mobilefone a letter stating that it wished to amend its application by adding a second frequency, 454.125 MHz, at locations #5, #6, and #7. The letter contained none of the technical, financial or operational data required by the Commission's rules.[7] For that reason it was returned to Mobilefone as defective on April 5, 1974. Therefore, Mobilefone shall be considered for the assignment of only one frequency (454.075 MHz). On September 11, 1973, in response to a Commission staff request, Mobilefone submitted additional information regarding its application. The submission contained data on channel loading and need for an additional frequency as well as certain technical information.

5. The third applicant, Industrial, is a California corporation which presently operates station KMD 990 in the DPLMRS in the Los Angeles, California area. On February 13, 1970 it made application to add two new frequencies (454.075 MHz and 454.125 MHz) and two new transmitters at existing transmitter locations at Santiago Peak in Orange County (#1) and Verdugo Park in Glendale, California (#3). The estimated cost of the proposed additions is $68,800. Industrial proposes to offer automatic/manual access services on the

[4] Such a certificate, where required by local law, is a prerequisite to the grant of a commission license. *See* 47 C.F.R. § 21.15(c)(4).
[5] Exhibit 8 attached to its application.
[6] On May 24, 1972 the Commission received a letter from Intrastate withdrawing its objection to the Mobilefone application.
[7] *See* 47 C.F.R. § 21.15.

new frequencies. On March 26, 1970 RDC filed a petition to deny the Industrial application of February 13, 1970. RDC argues first that Industrial has not submitted required information regarding the degree of loading of its present channels.[8] Also, it contends that the automatic direct dial service proposed by Industrial is inconsistent with RCC frequency allocations. Next, it contends that a grant of the two frequencies to Industrial would "fragment" the MCC market in the Los Angeles area and make MCC competition with wireline carriers more difficult. RDC then asks the Commission to investigate Industrial regarding the possibility of an unauthorized transfer of control. RDC does not contend that there *has* been a transfer but notes that an application for one was pending before the Commission and that there are indications that outside control was being exercised. RDC next contends that Industrial lacks the financial resources to construct the facilities proposed in its application. Finally, RDC contends that Industrial's present application is inconsistent with its transfer of control application, because that application stated that there would be no change in the type of operation (manual) then offered by Industrial. In its answer Industrial argues that its application is not defective and that the basis of its request for waiver of the rule requiring submission of a traffic load study is set forth in its application. In essence, Industrial proposes to offer a new type of service (automatic/manual access) for which it has no existing channel loading data. It offers as proof of need a list of twenty customers who have signed orders for its new service. Next, Industrial denies the allegation that the type of service it proposes is not consistent with MCC allocations, and questions the relevancy of arguments advanced by other carriers in unrelated proceedings and repeated by RDC here. Industrial further contends that RDC has misconstrued the Commission policy of MCC/wireline carrier competition. It insists that the ability of MCCs to compete is advanced through precisely the sort of innovation it proposes. Industrial then denies that there was an unauthorized transfer of control and that the "facts" alleged by RDC utterly fail to establish any such transfer. Industrial also denies the RDC allegation that it lacks financial qualifications. Finally Industrial contends that its application for two new frequencies and its transfer of control application are not inconsistent because it proposes no diminution of services presently being offered to the public. To the contrary the automatic service proposed in its application for new facilities would be in addition to services being offered presently. RDC in its reply renews its contention that the Industrial application is defective for failure to submit the information detailed in Section 21.516 of the Commission's rules and that Industrial's financial qualifications are questionable. It also finds "difficult to believe" the Industrial contention that there was no unauthorized transfer of control. On July 20, 1970 the Commission received a copy of a letter sent to RDC by the staff of the California Public Utilities Commission stating that the rates and conditions proposed by Industrial in its FCC application were not at that time effective in California. The letter further stated that the financing pro-

[8] *See* 47 C.F.R. § 21.516.

posed by Industrial in the application was not subject to prior California Commission approval. On September 3, 1970 a letter was received from Industrial asking the Commission to hold its application informally until the California Public Utilities Commission approved the tariffs for its automatic service. It stated that such approval might require a change in the rates proposed in its original FCC application. On September 15, 1970 the Commission received a letter from RDC requesting it to dismiss Industrial's application because it did not have authorization from the California Public Utilities Commission to provide the type of service proposed by it.[9] On October 2, 1970 the Commission received a letter from Industrial stating that it had filed tariffs [10] with the California Commission and that such a filing was sufficient under the FCC rule requiring a state franchise.[11] On October 7, 1970 the Commission received a letter from RDC asking it to dismiss the Industrial application. The tariffs filed by Industrial for its automatic service were approved by the California Public Utilities Commission on February 9, 1971.

6. On December 28, 1970, Industrial filed an application for a proposed station (#5) to be located at Saddle Peak, Malibu, California and operated on the frequency 152.18 MHz in the DPLMRS. This application was listed in the Commission's public notice of January 11, 1971 as a major amendment to the previous Industrial application for the frequencies 454.075 MHz and 454.125 MHz. On March 1, 1971 the Commission received essentially identical petitions from RDC and Intrastate seeking to dismiss the Industrial applications for 454.075 MHz, 454.125 MHz and 152.18 MHz. The petitions contend first that the Industrial application of December 28, 1970 is a major amendment to its application of February 13, 1970 and that as such it is untimely and required dismissal of both Industrial applications.[12] Further, each petitioner contends that Industrial is not financially qualified to construct and operate the facilities proposed in its applications. Both argue that Industrial's balance sheet of November 30, 1970 reveals an excess of current assets over current liabilities of only $1,050 which would not enable it to obtain financing to the extent of $43,800 through ordinary commercial channels as it proposes. Also, they contend that the $25,000 line of credit from California Mobile Telephone detailed in the February 13, 1970 application may not be available because of a pending bankruptcy proceeding. Industrial in its Opposition agrees that if its second application is treated as an amendment then it is untimely and should be dismissed. It argues, however, that its second application is not an amendment to the first because it proposes service to a different segment of the public not previously served and proposes service of a different type. Although the service area is within its 39 dbu contour, Industrial states that service in the area proposed in the 152.18 MHz application is inadequate and that there are significant areas with no coverage. Industrial contends that applications for different frequencies, to serve different segments of the public, proposing

[9] See 47 C.F.R. § 21.15(c)(4).
[10] On September 29, 1970 the California Public Utilities Commission issued an Order of Suspension and Investigation of the tariffs filed by Industrial for its "Automated Interconnected Mobile Telephone Service".
[11] 47 C.F.R. § 21.15(c)(4).
[12] See 47 C.F.R. §§ 21.23(c), 21.27, 21.30(b).

different types of service should be considered separately and that its applications present precisely that circumstance. Industrial believes that the listing of its second application was a clerical error and asks that it be separated from its previous application, assigned a new file number and considered separately. It emphasizes that the second application proposed absolutely no changes in the first. Intrastate in its reply contends that the Industrial application for 152.18 MHz should be dismissed as inconsistent with its earlier application under the Commission rule barring inconsistent or conflicting applications while an earlier application by the same party is pending and undecided.[13] Alternatively, Intrastate renews its argument that both Industrial applications must be dismissed under the cut-off rule [14] if the second Industrial application is treated as a major amendment to the first. On April 1, 1971 the Commission received from RDC a letter requesting that it dismiss the applications of Industrial pursuant to the cut-off rule and give early consideration to its application for 454.125 MHz. It cites as the basis for its request the public need for the service proposed in its own application and the economic hardship it continues to incur through lease and development of its presently unproductive transmitter site. On June 20, 1972 the Commission received a letter on behalf of Robert L. Mohr d/b/a Radiocall Corporation (Mohr) requesting it to defer consideration of the Industrial applications pending concurrent disposition of Mohr's application for modification of its station KLF515 which Industrial has protested. On June 22, 1972 the Commission received a copy of an agreement whereby Industrial and Intrastate proposed to share the frequency 152.18 on an equal co-user basis. On September 21, 1973 the Commission requested the filing of additional technical and financial information regarding the Industrial applications. In addition, Industrial's request for a waiver of Section 21.516 of the Commission's rules was denied and it was requested to furnish the information regarding traffic loading specified by that rule. By letter dated October 15, 1973, Industrial supplied the requested additional information regarding its application.

7. With regard to the issues raised in the various petitions and letters filed regarding the Industrial applications we find:

a. The listing of the second Industrial application (152.18 MHz) as an amendment to its earlier application was error. The 152.18 application will be assigned a new file number and will not be considered in this proceeding.

b. The November 30, 1970 balance sheet submitted by Industrial reveals current assets of $35,876 and current liabilities of $34,826.[15] The estimated cost of the facilities for its 450 MHz applications alone is $63,800. Industrial proposes to obtain the necessary resources by two means: a $25,000 line of credit from California Mobile Telephone Co. (CMT) and $43,800 through "ordinary commercial channels." Although Industrial did submit copies of documents committing CMT resources no information was included from which we could draw conclusions regarding CMT's financial ability to satisfy its undertaking.

[13] See 47 C.F.R. §§ 21.21.
[14] See 47 C.F.R. §§ 21.23(c), 21.27, 21.30(b).
[15] Industrial's financial report for 1973 (FCC Form L) covering the operations of KMD 990 reveals current assets of $44,577.80 and current liabilities of $79,739.14.

Further, we are unable to conclude from the information submitted that Industrial would be able to obtain "ordinary commercial financing" to the extent of $43,800. For these reasons we will consider Industrial's financial ability to build and operate its proposed facilities in the hearing on its application.

c. The traffic load study required by Section 21.516 of the Commission's rules was submitted by Industrial following denial of its request for waiver of that rule. Therefore the question raised regarding the absence of a traffic load study in its application has been resolved.

d. The possible "market fragmentation" alluded to by RDC is not sufficient basis for denial of a Commission license. The pursuit by the Commission of a policy of denying MCC applications *merely* because there is an existing carrier in a particular market would have the effect of establishing the first MCC in a given market as a monopoly itself. This is not, as RDC argues, the intent or effect of the separate MCC/wireline carrier allocations established in 1949.[16]

e. RDC argues that the automatic interconnected telephone service proposed by Industrial should not be allowed on frequencies allocated for use by MCC's. There is no such limitation on permissible service offerings currently incorporated within our rules. Further, we find that there are substantial reasons for not creating one. Our DPLMRS applicants, in increasing numbers, are specifying fully automatic service. Obviously these applicants believe that this service will streamline their operations and/or be more attractive to communications users. In other words they believe that fully automatic service represents an advance in the state of the art in this service. RDC would have us prohibit the use of these techniques on MCC frequencies. However we do not believe the public interest would be served by intentionally limiting the choice of services available to the users of mobile telephone service. RDC voices concern for its ability to compete with wireline carriers. But it overlooks the certain effect of its proposed limitation upon MCC/wireline competition. If RDC is concerned with the competitive power of MCC's it should seek to establish a regulatory climate which would allow it and other MCC's the greatest opportunity to innovate and satisfy new and varied demands for service. A proscription placed upon the variety of service offerings that may permissibly be offered by MCC's would have the certain effect of forcing those communications users who desire the proscribed service to take it from a wireline carrier. Further, we do not find the argument advanced by RDC compelling. It contends that the automatic service proposed by Industrial constitutes, in essence, the offering of regular telephone service and that it therefore should be confined to other than MCC frequencies. We cannot conclude that the interposition of an operator in the manual system makes it less similar to normal telephone service than an automatic system. The distinguishing feature of the service provided by carriers using either system is that the customer's telephone is mobile (in his automobile, * * * etc.) and that connection with the switched telephone network is accomplished through radio equipment provided by the MCC. In summary, we will not adopt a policy of restricting consumer choice in the market for

[16] *Non Broadcast Frequency Allocations*, 1 RR 91 :143 (1949).

mobile communications services where, as here, there is not some compelling public interest reason to do so.

f. The questions raised regarding the possibility of an unauthorized transfer of control of Industrial have been resolved. By a decision [17] released November 27, 1970 we approved transfer of the outstanding Industrial stock owned by Homer N. Harris to Communication Investment of California, Inc.[18]

g. We need not address the question raised regarding Industrial's compliance with Section 21.15(c)(4) of the Commission's rules requiring the submission of a state franchise. The Public Utilities Commission of California has approved the tariff filed by Industrial for its automatic interconnected mobile service.[19]

h. We note the letter of June 20, 1972 sent on behalf of Robert L. Mohr d/b/a Radiocall Corporation (Mohr). The Mohr letter requests that the Commission defer consideration of the Industrial application on the basis that Commission policy does not permit a protestant to improve his competitive position with respect to another carrier while there remains outstanding a petition to deny the other carrier's application for modified facilities.[20] The cases cited in the letter [21] do not support application of such a rule in the factual setting of this case. Further, we do not believe the public interest would be served by still further delay of an application pending since early 1970. For these reasons we shall not delay consideration of the Industrial application as requested by the Mohr letter.

8. In view of the foregoing, IT IS ORDERED, That pursuant to Sections 309 (d) and (e) of the Communications Act of 1934, as amended, (47 U.S.C. §§ 309 (d) and (e)) that the captioned applications of RADIO DISPATCH CORPORATION, MOBILEFONE, INC., and INDUSTRIAL COMMUNICATIONS SYSTEMS, INC. are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING upon the following issues:

1. To determine the nature and extent of the services proposed by each applicant, including, maintenance, personnel, and charges pertaining thereto.

2. To determine the total area and population to be served by Radio Dispatch Corporation within the 39 dbu contour of each proposed station based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations, and to determine the need for its proposed service in that area.

3. To determine the total area and population to be served by Mobilefone, Inc. within the 39 dbu contour of each proposed station based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations, and to determine the need for its proposed service in that area.

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[17] *In Re Homer N. Harris*, 26 F.C.C. 2d 609 (1970).
[18] We note that the proposed transfer was not effected.
[19] CPUC Resolution No. T–7271, February 9, 1971.
[20] Industrial has filed a petition to deny Mohr's application (file No. 6171–C2–P–12) to change the location of its transmitting antenna alleging, *inter alia*, that the change would allow Mohr to operate in areas for which he does not hold a certificate of public convenience and necessity from the California Public Utilities Commission.
[21] *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945); *Radio Relay Corp. v. FCC*, 409 F.2d 322 (2d Cir. 1969); *Collier Electric Co.*, 14 RR 848 (1956).

4. To determine the total area and population to be served by Industrial Communications Systems, Inc. within the 39 dbu contour of each proposed station based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations, and to determine the need for its proposed service in that area.

5. To determine whether or not Radio Dispatch Corporation possesses the necessary financial qualifications to construct and operate its proposed facilities, as required by Section 21.500(a) of the FCC Rules and Regulations.

6. To determine whether or not Industrial Communications Systems, Inc. possesses the necessary financial qualifications to construct and operate its proposed facilities, as required by Section 21.500(a) of the FCC Rules and Regulations.

7. To determine, in light of evidence adduced pursuant to the foregoing issues, what disposition of the above-captioned applications would best serve the public interest, convenience and necessity.

9. IT IS FURTHER ORDERED, That the hearing shall be held at the Commission offices in Washington, D.C. at a time and place and before an Administrative Law Judge, to be specified in a subsequent order.

10. IT IS FURTHER ORDERED, That the burden of proof on Issues 2 and 5 is upon Radio Dispatch Corporation, the burden of proof on Issues 4 and 6 is upon Industrial Communications Systems, Inc., the burden of proof on Issue 3 is upon Mobilefone and the burden of proof upon Issues 1 and 7 is upon all applicants.

11. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, is made a party to the proceeding.

12. IT IS FURTHER ORDERED, That applicants may avail themselves an opportunity to be heard by filing with the Commission, pursuant to Section 1.221(c) of the Commission's Rules within twenty days of the release date hereof, a written notice stating an intention to appear on the date set for the hearing and present evidence on the issues specified in this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-653

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
RE-REGULATION OF RADIO AND TELEVISION BROADCASTING

ORDER

(Adopted June 19, 1974; Released June 24, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. As a result of the continuing study by its Task Force on Re-regulation of broadcasting, the Commission has under consideration the matter of amending certain provisions in Parts 1, 13, 73 and 74 of its Rules and Regulations.

2. These amendments up-date certain rules, delete parts of others which are no longer applicable, and eliminate various requirements which are no longer necessary.

3. The following rule changes are made for the reasons indicated:

(a) When application for extension of construction permit or application for a construction permit to replace an expired construction permit is made to the Commission, it is the normal practice, if the grant is made, that it be for a period of no more than six months (§ 1.534(a) and (b)). A phrase is added to the rule clearly limiting the grant to this period of time.

(1) Adding a phrase to the rule specifying that the grant is for a period of time not longer than six months, will clarify the matter for the applicant and relieve the staff of a work load created by telephonic and written questions by applicants regarding these extensions or authorizations.

(b) Clarifications are made in provisions in § 1.598, Period of Construction (for TV, AM, FM, auxiliary and Instructional Television Fixed Stations). The rule is revised to clearly state that the time allowed for completion of construction applies not only to new construction but to changes in existing stations as well.

In addition, reference to noncommercial educational FM stations is added to the list of "other broadcast, auxiliary, and ITFS." It has been unintentionally omitted heretofore.

(1) Many staff hours are used explaining to applicants that this rule includes the period of time allowed for completion of changes in licensed stations as well as for completion of new station construction. By clarifying the rule in this respect, and in adding the noncommercial educational FM service, previously omitted, the staff will be relieved of the burden of answering questions prompted by the rule as presently written.

(c) In paragraph 3(g) of this Order, clarification is made of the operator license posting requirements in the AM, FM and TV services. (§§ 73.92(b); 73.264(b); 73.564(b) and 73.660). These clarifying amendments prompt changes in Part 13, Commercial Radio Operators, in § 13.74, Posting requirements for operators. In addition to conforming the rules in Part 13 with 73, the modification provides an opportunity to entirely rewrite section 13.74 and remove certain ambiguities and difficulties in interpretation.

(1) In addition to the conforming amendments, the section is appropriately contemporized.

(d) The requirement that "an application for renewal of remote control authorization may be made on the application for renewal of a station license" is deleted. (§ 73.68, Remote control renewal application, paragraph (a)). This requirement contradicts the regularly updated directives of the License Division's "Notice to Licensees", which is attached to license renewal application forms mailed to licensees at renewal time. In this cover letter (Notice to Licensees), is this statement: "Application forms are enclosed . . .". "Separate applications . . . must be submitted for each authorization to be renewed, except that applications are not required for . . . Remote Control Authority, which you may have."

Further, it is impossible for licensees to conform to the requirements of § 73.68(a), directing that such applications for remote control authorization be made in the "application for renewal of station license." No such paragraph exists in section II (engineering section) of Form 303, Application for Renewal of Broadcast Station License.

Further, the requirements in § 73.68(a) for standard broadcast do not appear in the FM, noncommercial educational FM or TV rules.

Lastly, licensees of standard stations, confused by these contradictions, add to the administrative load of the staff by telephoning or writing requests for clarification.

(1) The deletion eliminates confusion, relieves the staff of onerous and time consuming administrative details entailed in handling confused licensees' communications, and conforms the standard broadcast station rules with the rules for the other broadcast services.

(e) Stations employing directional antennas and operated by remote control must make annual skeleton proofs of performance, and these measurements must be submitted with the station's license renewal application. This requirement is in paragraph (b) in § 73.68, Remote control renewal application, now proposed to be deleted. (See (d) above.) This paragraph (b), from the deleted section, is added to § 73.66, Remote control authorization, as new paragraph (c), where it more properly belongs. The requirement directs station licensees to make skeleton proofs of performance "consisting of three or four measurements on each radial", plus the monitoring point readings.

Stations using directional antennas and employing holders of 2nd class operator's licenses or endorsed 3rd class permits, for routine operation of the transmitting system, must make skeleton proofs, and partial proofs per § 73.93(e)(3). This requirement defines a skeleton proof as consisting of "at least three [measurements] on each of the radials . . . and include, on each radial, the point, if any, designated as a monitoring point in the station authorization." (§ 73.93—Note 3)

In the past stations using D.A.'s, operating remote control, received letters just prior to every triennial renewal of license, containing a special set of directions regarding skeleton proofs. This letter, from Chief, Renewal and Transfer Division, stated a minimum of five measurements should be made on each radial, including the monitoring point. Some 900 letters have been mailed by the Division over each three year period. This letter was revised 4–5–74, directing a minimum of three measurements on each radial.

(1) The contradiction contained in these three sets of directions is removed.

The new § 73.66(c)—the deleted § 73.68(b)—is modified to conform with Note 3, § 73.93.

One conformed requirement, for the making of skeleton proofs, will now be stated in §§ 73.66(c); 73.93(e)(3) and the letter from Chief, Renewal and Transfer Division.

(f) The rule regarding specified hours stations (§ 73.73), states two exceptions to adherence to the requirements therein. (The exceptions are in §§ 73.71 and 73.72). Two additional exceptions which should be stated in § 73.73 are found in §§ 73.23(e) and 73.98(d).

(1) These exceptions, in §§ 73.23 and 73.98 are added to § 73.73, Specified hours, to make the rule complete and clear.

(g) Clarification is made of the license posting requirements in §§ 73.92(b); 73.264(b); 73.564(b) and 73.660—this last rule modified as detailed below in paragraph 3(1) of this Order.

(1) The posting of an operator license has commonly been accomplished by affixing it to the wall of the room considered to be the principal control point of the transmitter. Codification is made to allow the enclosing of the operator license in a binder or its insertion into a folder as an alternative to affixing it to the wall, so long as the license continues to be immediately and easily accessible at the control point.

In addition, it is made clear that operators' licenses (or FCC Form 759, Verification of Operator License or Permit) will be available at the control point during both on-duty and off-duty hours, so long as the operator is in the employ of the subject station, fulltime, part time or on a contract basis.

(h) In the AM operating log rules (§ 73.113), paragraph (a)(2)(ii) specifies certain indications be read on transmitting apparatus of stations with directional antennas not operated by remote control, one of which is "current radio indications".

(1) This is corrected to read "current ratio indications".

(i) The Commission Order adopted November 1, 1972, In the Matter of Re-regulation of radio and television broadcasting, modified the Operating log rule, § 73.113(a)(3). This amendment changed the entry of certain transmitter meter readings from every half hour to "an entry at the beginning of operation in each mode and at intervals not exceeding three hours . . .". This change became effective December 15, 1972.

Subsequent to this change, the Commission adopted the Report and Order, finalizing Docket 18455, In The Matter of Amendment of Part 73 of the Rules and Regulations with respect to use of remote indicating phase monitors and the inspection requirements for remotely con-

trolled directional stations. This proceeding changed certain provisions in § 73.113, and in writing the changes, log entry requirements adopted in the above-mentioned Order of November 1, 1972, were inadvertently omitted. In § 73.113 (a)(1)(iv) and (a)(3) the rule now states that entries must be made in the operating log "at the time of commencement of operation and, thereafter, at successive intervals not exceeding three hours in duration."

The rule should properly and correctly state ". . . at the time of commencement of operation *in each mode* and thereafter . . .". The italicized addition *in each mode* is the omission made in the rewritten rule in Docket 18455.

(1) This correction appropriately states the operating log requirements.

(j) For SCA subcarriers, Section 73.319 (Subsidiary communications multiplex operations: engineering standards) specifies only the modulation limits for the SCA subcarriers, without specifying the frequency tolerance. Frequency tolerance is specified in § 73.295 (Operation under Subsidiary Communications Authorizations). The rule—§ 73.319—is now written to include these frequency tolerance specifications.

(1) Section 73.319 will be complete with the addition of these specifications. Furthermore, the licensee will benefit from this clarification. The inclusion will also be an aid to the F.O.B. in exercising precise enforcement of these requirements.

(k) Sections 73.572(a) (1) and (2), concerning remote control authorization for noncommercial educational FM stations, are amended to state the correct FCC form to be used in requesting such authorizations.

(1) The applicant is, under present rules, directed to use FCC Form 301. The proper form to use is FCC Form 340. Changes in the rule are made accordingly.

(l) In the AM, FM and noncommercial educational FM services, requirements concerning the posting of the station license and any other instrument of station authorization, and the posting of operator licenses, are stated in one section in each of the subparts of Part 73 designated for these three services. In the Television Broadcast Station rules (Subpart E of Part 73), the requirements pertaining to posting of station and operator licenses appear in *two* different sections: posting of station licenses in § 73.660; and posting of operator licenses in § 73.661, Operator requirements. Changes are made which will state the requirements for posting of TV station authorizations and the posting of operator licenses in one section in Subpart E, Part 73.

(1) The requirements for posting operator licenses are removed from § 73.661, Operator requirements, and added to § 73.660, Station license, posting of, which is re-titled "Station and operator licenses; posting of". This conformation of the TV rules will terminate an inconsistency in the rule formatting which has existed heretofore.

(m) A clarifying modification is made in the provisions in the TV rules (§ 73.661, Operator requirements), that an operator on duty must have ready access to and visibility of the transmitter or the remote control and monitoring equipment. The rule is rewritten to provide that the transmitter be readily accessible and so located to the operat-

ing position that deviations from normal indications of the instruments can be observed.

(1) The AM and FM rules were clarified with respect to this ability to observe deviations from normal indications of the instruments in a Commission Order adopted December 20, 1972. This conforms the TV rules to the AM and FM rules in this regard.

(n) Paragraph (b) of Section 74.661, Frequency tolerance, was amended by Commission Order dated December 1, 1972. That Order made a number of editorial changes in the Commission rules. Inadvertently, a substantive change was made in § 74.661(b), pertaining to frequency tolerance. The paragraph is rewritten and corrected.

(1) The paragraph now clearly states Commission requirements pertaining to the frequency tolerances of the aural portion of TV broadcast program material which is transmitted over aural broadcast STLs or intercity relays.

4. Amendments hereby adopted are editorial revisions, deletions, corrections and relaxations of existing rule provisions. They also conform language of certain rule provisions to established Commission policy and practice. We conclude that adoption of the amendments will better serve the public interest. Therefore, prior notice of rule making and public procedure thereon are unnecessary, pursuant to the Administrative Procedure and Judicial Review Act provisions of 5 U.S.C. 533(b)(3)(B).

5. Therefore, IT IS ORDERED, That, pursuant to Sections 4(i) and 303 (j) and (r) of the Communications Act of 1934, as amended, Parts 1, 13, 73 and 74 of the Commission's Rules and Regulations are amended as set forth in the attached Appendix, effective August 2, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

1. Sections 1.534 (a) and (b) are amended to read as follows:

§ 1.534 Application for extension of construction permit or for construction permit to replace expired construction permit.

(a) Application for extension of time within which to construct a station shall be filed on FCC Form 701. The application shall be filed at least 30 days prior to the expiration date of the construction permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, an application will be accepted upon a showing satisfactory to the Commission of sufficient reasons for filing within less than 30 days prior to the expiration date. Such applications will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension. If approved, such extensions will be limited to periods of not more than 6 months.

(b) Application to replace an expired construction permit shall be made on FCC Form 321, "Application for Construction Permit to Replace Expired Permit." Such applications must be filed within 30 days of the expiration date of the authorization sought to be replaced. If approved, such authorization shall specify a period of not more than 6 months within which construction shall be completed and application for license filed.

2. Section 1.598 (a) and (b) is amended to read as follows:

§ 1.598 Period of construction.

(a) *Television broadcast stations.* Each original construction permit for the construction of a new television broadcast station, or to make changes in an ex-

isting station, shall specify a period of 18 months within which construction shall be completed and application for license filed. Permittees for new television stations shall file a report in the ninth month after the grant of the construction permit setting forth the progress made forward building the station. Such progress report shall be signed by the principal(s) of the permittee.

(b) *Other broadcast, auxiliary and Instructional Television Fixed Stations.* Each original construction permit for the construction of a new standard, FM, noncommercial educational FM, or international broadcast station and for television or FM translator or FM booster, broadcast auxiliary or Instructional Television Fixed Station (ITFS), or to make changes in such existing stations, shall specify a period of 12 months within which construction shall be completed and application for license be filed.

3. Section 13.74 and headnote are amended to read as follows:

§ 13.74 Posting requirements for operator licenses.

(a) Licensed commercial radio operators, on duty at a single transmitting system, shall post their radio operator license or permit in accordance with the rules governing that station when:

(1) performing radio operating duties and in charge of the transmitting systems or,

(2) supervising or performing service and maintenance or inspection duties at the transmitting systems.

(b) Licensed commercial radio operators, on duty at two or more transmitting systems, which are not co-located, shall post their radio operator license or permit at one of the stations, and a valid verified posting statement (FCC Form 759) at each other station in accordance with the rules governing those stations when:

(1) performing radio operating duties and in charge of the transmitting systems or,

(2) supervising or performing service and maintenance or inspection duties at the transmitting systems.

(c) In stations where rules for that service do not require posting, licensed commercial operators on duty and in charge of transmitting systems or performing service and maintenance or inspection duties of such transmitting systems, shall have on their person their radio operator license or permit, or a valid license verification card (FCC Form 758–F), which shall be available for inspection upon request by a Commission representative.

4. Section 73.66 is amended to add new paragraph (c) to read as follows:

§ 73.66 Remote control authorization.

* * * * * * *

(c) Stations employing directional antennas and operated by remote control shall make a skeleton proof of performance each year. This skeleton proof shall consist of at least three field strength measurements on each of the radials established in the latest complete adjustment of the directional antenna system. These measurements shall be made at measurement locations utilized in such adjustment, and if the radial includes a monitoring point, as designated in the station authorization, one of the measurements shall be made at that point. The results of these measurements must be submitted with the station's license renewal application.

§ 73.68 [Deleted]

5. Section 73.68 is deleted. The provisions of paragraph (b) are redesignated as § 73.66(c). Section 73.68 is listed as [Reserved]

6. Section 73.73 is amended to read as follows:

§ 73.73 Specified hours.

If the license of a station specifies the hours of operation, the schedule shall be adhered to except as provided in §§ 73.23(e); 73.71; 73.72 and 73.98(d).

7. Section 73.92(b) is amended to read as follows:

§ 73.92 Station and operator licenses; posting of.

* * * * * * *

(b) The operator license, or FCC Form 759 (Verification of Operator License or Permit), of each station operator employed fulltime, part time, or via contract,

shall be permanently posted at the place where the operator is on duty and shall remain posted so long as the operator is employed by the licensee. The posting of the operator license shall be done in such a way as to comply with the following requisites:

(1) That operator licenses shall be posted at the place the licensee considers to be the principal control point of the transmitter;

(2) That operator licenses will be readily available and easily accessible at the posting location;

(3) That posting will be accomplished by affixing the license to the wall of the room of the control point of the transmitter, or enclosing in a binder or inserting into a folder and retaining at the principal control point.

8. Section 73.113(a)(1)(iv), (a)(2), (a)(2)(ii), and (a)(3) are amended to read as follows:

§ 73.113 Operating log.

(a) * * *

(1) * * *

(iv) The following indications shall be entered in the operating log at the time of commencement of operation in each mode and thereafter, at successive intervals not exceeding 3 hours in duration.

(2) For stations with directional antennas not operated by remote control, the following indications, in addition to those specified in subparagraph (1) of this paragraph, shall be read and entered in the opening log at the time of commencement of operation in each mode and thereafter, at successive intervals not exceeding 3 hours in duration. (This schedule shall apply, regardless of any provision in the station instrument of authorization requiring more frequent log entries.)

* * * * * * *

(ii) Remote antenna base current or antenna monitor sample current or current ratio indications.

(3) For stations with directional antennas operated by remote control, the following indications, in addition to those specified in subparagraph (1) of this paragraph, shall be read and entered in the operating log at the time of commencement of operation in each mode and thereafter, at successive intervals not exceeding 3 hours in duration. (This schedule shall apply, regardless of any provision in the station instrument of authorization requiring more frequent log entries.)

9. Section 73.264(b) is amended to read as follows:

§ 73.264 Station and operator licenses; posting of.

* * * * * * *

(b) The operator license, or FCC Form 759 (Verification of Operator License or Permit) of each station operator employed fulltime, part time, or via contract, shall be permanently posted at the place where the operator is on duty and shall remain posted so long as the operator is employed by the licensee. The posting of the operator license shall be done in such a way as to comply with the following requisites:

(1) That operator licenses shall be posted at the place the licensee considers to be the principal control point of the transmitter;

(2) That operator licenses will be readily available and easily accessible at the posting location;

(3) That posting will be accomplished by affixing the license to the wall of the room of the control point of the transmitter, or enclosing in a binder or inserting into a folder and retaining at the principal control point.

10. Section 73.319 is amended to add new paragraph (f) to read as follows:

§ 73.319 Subsidiary communications multiplex operations: engineering standards.

* * * * * * *

(f) The center frequency of each SCA subcarrier shall be kept at all times within 500 hertz of the authorized frequency.

11. Section 73.564(b) is amended to read as follows:

§ 73.564 Station and operator licenses; posting of.

* * * * * * *

(b) The operator license, or FCC Form 759 (Verification of Operator License or Permit), of each station operator employed fulltime, part time, or via contract, shall be permanently posted at the place where the operator is on duty and shall remain posted so long as the operator is employed by the licensee. The posting of the operator license shall be done in such a way as to comply with the following requisites:

(1) That operator licenses shall be posted at the place the licensee considers to be the principal control point of the transmitter;

(2) That operator licenses will be readily available and easily accessible at the posting location;

(3) That posting will be accomplished by affixing the license to the wall of the room of the control point of the transmitter, or enclosing in a binder or inserting into a folder and retaining at the principal control point.

12. Sections 73.572(a)(1) and (2) are amended to read as follows:

§ 73.572 Remote control authorization.

(a) * * *

(1) A request to operate a new station by remote control may be included in the application (FCC Form 340) for construction permit or modification of construction permit.

(2) A request to change a remote control point to a new studio location beyond the corporate limits of the community to which the station is assigned and at a point other than the authorized transmitter site may be included in the application (FCC Form 340) for authority to change the main studio location.

* * * * * * *

13. Section 73.660 and headnote are amended to read as follows:

§ 73.660 Station and operator licenses; posting of.

(a) The station license and any other instrument of station authorization shall be posted in a conspicuous place and in such manner that all terms are visible at the place the licensee considers to be the principal control point of the transmitter. At all other control points listed on the station authorization, a photocopy of the station license and other instruments of station authorization shall be posted.

(b) The operator license, or Form 759 (Verification of Operator License or Permit), of each station operator employed fulltime, part time or via contract, shall be permanently posted at the place where the operator is on duty and shall remain posted so long as the operator is employed by the licensee. The posting of the operator license shall be done in such a way as to comply with the following requisites:

(1) That operator licenses shall be posted at the place the licensee considers to be the principal control point of the transmitter;

(2) That operator licenses will be readily available and easily accessible at the posting location;

(3) That posting will be accomplished by affixing the license to the wall of the room of the control point of the transmitter, or enclosing in a binder or inserting into a folder and retaining at the principal control point.

14. Section 73.661 is amended to read as follows:

§ 73.661 Operator requirements.

One or more operators holding a valid radiotelephone first-class operator license shall be on duty at the place where the transmitting apparatus is located or at a remote control point established pursuant to the provisions of § 73.677 and in actual charge thereof whenever the transmitter is delivering power to the transmitting antenna. The licensed operator on duty and in charge of the television broadcast transmitter may, at the discretion of the licensee, be employed for other duties or for the operation of another station or stations in accordance with the class of license which he holds and the rules and regulations governing such other stations. However, such other duties shall in no wise impair or impede the required supervision of the television broadcast transmitter. If operation by remote control has not been authorized, the transmitter shall be readily accessible, and located sufficiently close to the operator at the normal operating position that deviations from normal indications of required instruments can be observed from that position. If operation by remote control is authorized, the control and monitoring equipment shall be readily accessible,

and located sufficiently close to the operator at the normal operating position that deviations from normal indications of required instruments can be observed from that position.

15. Section 74.661(b) is amended to read as follows:

§ 74.661 Frequency tolerance.

* * * * * * *

(b) Television STL stations transmitting the aural portion of television broadcast program material over an aural broadcast STL or intercity relay station licensed under the provisions of Subpart E of this part shall maintain the operating frequency of such aural broadcast STL or intercity relay station within 0.005 percent of the assigned frequency.

* * * * * * *

109-000—74——7

FCC 74-627

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
ROUNDUP TV TAX DISTRICT
Concerning a construction permit for a new VHF television broadcast translator station

JUNE 12, 1974.

This refers to your application (BPTTV-4924) for a construction permit for a new VHF television broadcast translator station to serve Roundup, Montana, and surrounding area, by rebroadcasting the signals of the ATS-F earth satellite on output channel 4.

The Commission has considered the data submitted in support of your request for waiver of several of its rules and has determined that a grant of the application, subject to certain conditions, would serve the public interest, convenience and necessity. Your application is being granted, in part, in accordance with the provisions of section 1.110 of the Commission's rules, to specify transmitter output power of 10 watts in lieu of the 100 watts proposed. The application is also being granted subject to the following conditions:

1. An operator holding a valid first-class radiotelephone permit shall, as often as may be necessary to assure the proper functioning of the equipment, inspect and adjust the equipment.

2. The permittee shall install, use and maintain type-approved aural modulation monitoring equipment and frequency monitoring equipment which was formerly type approved.

3. The translator station authorized herein shall be identified by one of the methods prescribed by section 74.750(c)(7) of the Commission's rules.

4. This authorization and any license issued in connection therewith shall expire one (1) year from the date of grant of this construction permit.

Section 1.110 of the Commission's rules provides that where an application is granted with terms or conditions other than those requested, the Commission's action shall be final unless, within thirty (30) days, the applicant gives written notice to the Commission rejecting the grant as made. Upon receipt of such a rejection, the Commission will set aside its grant and designate the application for hearing.

In view of the foregoing, you are advised that the Commission has this day waived sections 74.701, 74.731, and 74.750(a) of its rules and has granted your application, in part, in accordance with specifications to be issued and subject to the conditions therein contained.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-645

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re TELEPROMPTER CABLE COMMUNICATIONS CORP., MISSOULA, MONT. TELEPROMPTER CABLE COMMUNICATIONS CORP., HAMILTON, MONT. Requests for Special Relief	CSR-213 (MT028) CSR-214 (MT020)

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 27, 1974)

BY THE COMMISSION:

1. On August 21, 1972, TelePrompTer Cable Communications Corporation (TPT), filed a "Petition for Special Relief" on behalf of its cable television systems at Missoula and Hamilton, Montana. The petitions, seeking waiver of Section 76.93(b) of the Commission's Rules,[1] were filed in response to requests for "same-day" network program exclusivity submitted by Garryowen Butte, T.V., Inc., licensee of Station KPAX-TV, Missoula, Montana. The Missoula and Hamilton systems serve approximately 9,600 and 850 subscribers. respectively, with the following television broadcast signals:

KPAX-TV (ABC/CBS, Ch. 8), Missoula, Montana
KGVO-TV (NBC/ABC, Ch. 13), Missoula, Montana
KREM-TV (ABC, Ch. 2), Spokane, Washington
KXLY-TV (CBS, Ch. 4), Spokane, Washington
KHQ-TV (NBC, Ch. 6), Spokane, Washington
KSPS-TV (Educ., Ch. 7), Spokane, Washington

In addition, pursuant to a recently issued certificate of compliance, the Missoula system carries Station KWGN-TV (Ind.), Denver, Colorado. The Missoula system is located within the Missoula, Montana, smaller television market, while the Hamilton system is located outside all television markets. Each system is located within the predicted Grade A contour of Station KPAX-TV, but beyond the predicted Grade B contours of Stations KREM-TV and KXLY-TV which together duplicate many of the network programs broadcast by Station KPAX-TV.

2. TPT raises several arguments in support of its petitions. It first asserts that Station KPAX-TV broadcasts no locally-originated Missoula programming but, rather, is a satellite of Station KXLF-TV,

[1] Section 76.93(b) of the Commission's Rules provides as follows:
"Notwithstanding the provisions of paragraph (a) of this section, on request of a television station licensed to a community in Mountain Standard Time Zone that is not one of the designated communities in the first 50 major television markets, a cable television system shall refrain from duplicating any network program broadcast by such station on the same day as its broadcast by the station."

Butte, Montana, its parent station located 90 miles from Missoula. Because of KPAX–TV's non-originating satellite status, TPT maintains that the station is not entitled to same-day network program exclusivity protection. Secondly, TPT alleges that Station KPAX–TV broadcasts a technically inferior signal. TPT asserts, and supports by affidavit of the systems' manager, (a) that Station KPAX–TV frequently transmits a picture distorted by certain co-channel interference, allegedly attributable to its retransmission of its parent's signal, picked up off-the-air, and (b) that transmitter malfunctions at KPAX–TV have caused certain outages and occasional losses of audio or color transmission. Petitioner asks the Commission to waive or stay the provisions of Section 76.93(b) of the Rules until Station KPAX–TV presents clear evidence that it has alleviated such technical difficulties. If same-day network exclusivity protection is required, urges TPT, there will be situations where the deleted stations' programs are broadcast before KPAX–TV broadcasts them, and if KPAX–TV's technical difficulties later result, certain programs will be lost to cable subscribers. Petitioner asserts that waiver of the same-day rule—but retention of a simultaneous requirement—would be a reasonable alternative. Lastly, TPT asks that, if the Commission denies its request for waiver of the same-day network program exclusivity rules, it at least rule that Station KPAX–TV, which carries ABC and CBS programming, be entitled to same-day protection for the programming of only one network.

3. Following several requests for extension of time, Garryowen filed, on November 16, 1972, an "Opposition of Garryowen Butte, T.V., Inc., to Petition for Special Relief." It is Garryowen's position that the Commission's same-day network program exclusivity rules do not withhold protection for satellite stations that do not locally originate programming. On the contrary, Garryowen asserts, the grant of program exclusivity, allegedly an essential element in increasing a station's audience, may be instrumental in KPAX–TV's possible emergence from its present status as a satellite. Garryowen's opposition and an attached affidavit of KPAX–TV's Chief Engineer characterize TPT's co-channel interference allegation as a gross exaggeration. The station's licensee admits that occasional skip interference results from ionospheric conditions during June and July but asserts that such interference is minimal and substantially non-existent during ten months of the year. Garryowen maintains, and supports by affidavit and by a letter submitted by its transmitter's manufacturer, that any pre-existing transmitter difficulties have been resolved. Also submitted is a series of photographs taken of a television monitor connected to petitioner's Missoula cable system. In Garryowen's opinion, the photos of KPAX–TV's picture and the pictures of other signals carried on the system demonstrate that the KPAX–TV picture is as good as any on the Missoula system, and better than those transmitted on Stations KREM–TV and KXLY–TV (against which Garryowen seeks exclusivity protection). Finally, Garryowen asserts that its broadcast of ABC as well as CBS network programs in no way affects its right, under the Commission's Rules, to request same-day protection for all its network programming.

4. TPT's reply, filed December 29, 1972, briefly reiterates its earlier arguments, asserts that grant of Garryowen's "two-network" exclu-

sivity request would cause its Missoula and Hamilton cable subscribers to (a) lose the one-to-one identification by the viewer of a particular channel with a particular network, and (b) receive less than the minimum three full network service standard of the *Cable Television Report and Order*. Petitioner disputes Garryowen's statement that KPAX–TV's transmitter problems have been resolved and submits another affidavit of the systems' manager which indicates seven instances, between October 31, 1972, and December 12, 1972, where transmitter problems allegedly caused brief outages or audio loss. TPT again asks that it not be required to afford same-day network program exclusivity protection until Station KPAX–TV's technical problems have been alleviated.

5. In its "Response of Garryowen Corporation to Reply to Opposition to Petition for Special Relief," filed April 5, 1973, Garryowen admits that the Commission's Rules do not provide for such an additional pleading, but reasons that TPT, by the terms of its submissions, has invited the presentation of clear evidence that KPAX–TV's technical problems have been alleviated. Garryowen's pleading and the attached affidavit of KPAX–TV's Chief Engineer first take issue with TPT's list of seven occurrences (over a two-month period) during which KPAX–TV allegedly had experienced "transmitter-related problems." According to Garryowen, its logs and records indicate that, of the seven "problems" listed by TPT, two did not occur, one was the result of problems only at the parent station, KXLF–TV, and one was attributable to difficulties along the network feed. Of the other three listed problems, Garryowen states that two were due to unforeseeable tube failures and another the result of an adjustment to the station's aural transmitter. Garryowen contends that these problems, each lasting no longer than a few minutes, were "truly insignificant" in view of the fact that KPAX–TV broadcasts from approximately 7:00 A.M. to 12:30 A.M., seven days a week. Garryowen further notes that, during a three month period immediately following the KPAX–TV "problems" listed by TPT, not a single outage had occurred. While, states Garryowen, the performance of its transmitter is not intended to indicate that the station has reached a state of perfection (Garryowen admits that three brief outages have since occurred but states that modification or replacement of equipment corrected the problems) it does serve to refute TPT's impression that KPAX–TV is subject to constant technical difficulties.

6. That Station KPAX–TV is a satellite station has no bearing on a determination of these exclusivity issues. In regulating cable television, the Commission has treated all similarly situated television broadcast stations alike, regardless of whether they are satellites, on the theory that satellite stations may eventually initiate or expand local programming and leave satellite status. The case law is instructive here. In *Highland Cable TV, Inc.*, FCC 74–96, 45 FCC 2d 148, we stated that program exclusivity is dependent on predicted contours of television stations, not on community orientation or ties; *TV Cable of Elk City*, 26 FCC 2d 848 (1970), stated that a satellite station's failure to present programming of local interest is irrelevant to the reasons which are set forth in the *First Report and Order* and the *Second Report and Order* for extending program exclusivity. Fur-

thermore, we find that TPT's submissions do not rebut the presumption of service indicated by Station KPAX–TV's predicted contours, nor establish that the station is so technically deficient that a waiver of the Commission's exclusivity rules should be granted. Indeed, the most recent data submitted in this matter persuades us that KPAX–TV technical operation is adequate.[2] We also reject TPT's suggestion, in its original "Petition for Special Relief," that a Commission prescription of "simultaneous" rather than "same-day" protection would be a reasonable result in the instant proceeding. TPT has presented no data, in the form of relevant program schedules or otherwise, to support its request for a change from same-day to simultaneous exclusivity. (See *Magic Valley Cable Vision, Inc.*, FCC 73–94, 39 FCC 2d 166 (1973), where the Commission discussed the possibility of such an *ad hoc* waiver procedure.) Lastly, we find totally unpersuasive, in the case before us or as a general proposition, that a television station carrying programs of more than one network should be entitled to protection of only one network's programming. TPT's Missoula and Hamilton systems carry a primary affiliate (licensed to Spokane, Washington) of each major national network. That some of these stations' programming may be subject to deletion will not defeat the intent of the Rules nor, as it relates to the smaller market Missoula system, the literal provisions of Section 76.59(b). All network programs of the Spokane stations not carried by Station KPAX–TV (and absent any exclusivity request by another higher priority station carrying such programs) may be presented over the subject cable systems.

In view of the foregoing, the Commission finds that grant of the subject waiver requests would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition[s] for Special Relief," (CSR–213, CSR–214) filed by TelePrompTer Cable Communications Corporation, ARE DENIED.

IT IS FURTHER ORDERED, That TelePrompTer Cable Communications Corporation shall comply with the provisions of Section 76.93(b) on its cable television systems at Missoula and Hamilton, Montana, within thirty (30) days of the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] *Inter alia*, in view of the other information available, we are not relying on the proffered photographs.

FCC 74-644

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
TRIANGLE PUBLICATIONS, INC., LANCASTER, PA. } CSR-178
Petition for Special Relief

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1974; Released June 26, 1974)

BY THE COMMISSION:

1. On July 18, 1972, Triangle Publications, Inc.,[1] licensee of Station WLYH-TV, Lancaster, Pennsylvania, filed a "Petition for Special Relief" pursuant to Section 76.7 of the Rules, requesting that the Commission reinstate Lebanon, Pennsylvania, as part of the Harrisburg-Lancaster-York, Pennsylvania, television market (#57). The petition is unopposed.

2. Station WLYH-TV (CBS, Channel 15) is located approximately 5.7 miles SSW of Lebanon, Pennsylvania. On November 7, 1962, at the request of Triangle, the Commission amended the Table of Assignments, changing the assignment of Channel 15 from Lebanon to Lancaster-Lebanon, and modified the license of Station WLYH-TV to specify Lancaster, Pennsylvania, as the station location.[2] In its opinion, the Commission stated that it expected WLYH-TV to continue to meet its obligations to the city of Lebanon and maintain studios there.

3. In the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143 (1972), the Commission designated in Section 76.51(b) of the Rules Harrisburg-Lebanon-Lancaster-York, Pennsylvania, as the 57th major television market. Since Lebanon does not have a television station licensed to it, that city was dropped from the major market list in the *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972). Triangle now requests the Commission to reinstate Lebanon as part of the Harrisburg-Lancaster-York television market.

4. In support of its request, Triangle states the following: (a) Station WLYH-TV is operated from a site only some five miles from Lebanon and the Station is required to originate programming from its Lebanon studio.[3] (b) Lebanon and its surrounding area provide a substantial part of the Station's audience and its local advertising

[1] In September 1972, Station WLYH-TV was sold to its present owner, Gateway Communications, Inc.

[2] *Amendment of Section 3.606 Table of Assignments, Television Broadcast Stations*, FCC 62-1167, —— FCC 2d —— (Released November 8, 1962). In *Fourth Report and Order*, FCC 65-504, —— FCC 2d —— (Released June 8, 1965), the assignment of Channel 15 was changed to Lancaster, Pennsylvania.

[3] Station WLYH-TV operates studios at both Lebanon and Lancaster, Pennsylvania.

income. (c) The 35-mile zone is designed to protect local television stations by assuring that unrestricted cable operations will not be permitted within the area from which a station derives the major part of its local revenues. Although Station WLYH–TV is not licensed to the city of Lebanon, the situation of Station WLYH–TV indicates that the city should be provided with a zone of protection.

5. In the *Cable Television Report and Order, supra*, the Commission fixed a reference point in the center of the community to which each television station is licensed for the purpose of establishing the specified zone of each television market. Triangle would have us depart from this procedure in the case of Station WLYH–TV and establish a specified zone for Lebanon although no television station is licensed to that community. Triangle has failed to make a sufficient showing to warrant the relief requested. Lebanon is presently located within the Harrisburg-Lancaster-York television market. Should Lebanon be reinstated to this hyphenated market, a relatively small area to the northeast of Lebanon would be added to the market. In determining whether we should depart from our established policy and add Lebanon to the Harrisburg-Lancaster-York market, detailed information concerning the area affected must be considered. Information as to the number of communities located in the affected area and their populations, the number of cable television systems presently operating in the affected area and their signal carriage, and the amount of Station WLYH–TV's audience derived from within the affected area would be pertinent to the question of whether Station WLYH–TV should be afforded the protection which it seeks. Additionally, since the relief requested involves a change in Section 76.51(b) of the Commission's Rules, Triangle must submit a petition for rule making pursuant to Part 1, Subpart C of the Commission's Rules.

In view of the foregoing, the Commission finds that a denial of the subject petition for special relief is consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Special Relief" filed by Triangle Publications, Inc., licensee of Station WLYH–TV, Lancaster, Pennsylvania, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

FCC 74-656

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of UNITED TELEVISION CO., INC. (WFAN-TV),[1] WASHINGTON, D.C. For Renewal of License	Docket No. 18559 File No. BRCT-585
UNITED TELEVISION CO., INC. (WFAN-TV),[1] WASHINGTON, D.C. For Construction Permit	Docket No. 18561 File No. BPCT-3917
UNITED BROADCASTING CO., INC. (WOOK), WASHINGTON, D.C. For Renewal of License	Docket No. 18562 File No. BR-1104
WASHINGTON COMMUNITY BROADCASTING CO., WASHINGTON, D.C. For Construction Permit for New Standard Broadcast Station	Docket No. 18563 File No. BP-17416

ORDER

(Adopted June 25, 1974; Released July 2, 1974)

BY THE COMMISSION:

1. Under consideration are: (1) a petition for alternative relief, filed May 30, 1974, by United Television Company, Inc. and United Broadcasting Company, Inc. (together "United"); (2) oppositions, filed on June 4, 1974, by Washington Community Broadcasting Company (Community) and on June 5, 1974, by the Chief, Broadcast Bureau; and (3) a reply, filed on June 14, 1974, by United.

2. In its petition for alternative relief, United requests the Commission to suspend the further conduct of this proceeding by extending the time for the filing of exceptions to the Initial Decision, FCC 73D-7, released February 22, 1973, until the 93rd Congress acts on pending broadcast license renewal legislation or until the 93rd Congress adjourns *sine die;* or, in the alternative, to adopt new criteria similar to the pending legislation for the disposition of pending license renewal applications in comparative renewal proceedings and remand the case to the Administrative Law Judge for findings and conclusions consistent with the new criteria.

3. The petition for alternative relief will be denied. We have considered United's arguments in support of the relief requested and find them without merit. United's first request is predicated on an assumption that broadcast license renewal legislation now pending before

[1] On April 16, 1974, the Commission revoked the license of WFAN-TV pursuant to Section 312(a)(3) of the Communications Act of 1934, as amended (47 U.S.C. § 312(a)(3)) for failure to operate substantially as set forth in the license (*United Television Company, Inc.*, FCC 74-386, released April 26, 1974).

Congress [2] will probably be enacted and will necessarily be substantively and retroactively applicable to this proceeding. The alternative request would require us to take the impracticable course of enunciating new standards for disposition of renewal cases in an area which now is the subject of various pending legislation. Should there be changes in the law or in Commission policy applicable to this proceeding prior to its final disposition, we will, of course, reach our decision in light of then applicable law or policy. This case was instituted on June 13, 1969; the Initial Decision was released on February 22, 1973; and the Commission on May 14, 1974, denied a petition to remand and a petition to reopen the record and to enlarge issues filed by United. There is no valid reason to delay further this already protracted proceeding at this time.

4. ACCORDINGLY, IT IS ORDERED, That the petition for alternative relief, filed May 30, 1974, by United Television Company, Inc. and United Broadcasting Company, Inc., IS DENIED; and

5. IT IS FURTHER ORDERED, That exceptions to the Initial Decision in this proceeding SHALL BE filed within 15 days from the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] H.R. 12993, S. 16, S. 247, S. 272, S. 646, S. 844, S. 849, S. 851, S. 1311 and S. 1589.

FCC 74-654

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK-TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT-327
LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT-4465

ORDER

(Adopted June 25, 1974; Released July 2, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (a) an application for review of a Memorandum Opinion and Order of the Review Board (FCC 73R-233, 41 FCC 2d 581, released June 22, 1973), filed June 29, 1973, by Western Communications, Inc. (KORK-TV); (b) an opposition, filed July 12, 1973, by Las Vegas Valley Broadcasting Co.; (c) comments, filed July 12, 1973, by the Chief, Broadcast Bureau; and (d) a reply, filed July 24, 1973, by Western Communications, Inc.

2. The Commission also has before it for consideration: (a) a request for leave to file supplement and supplement to its application for review, filed September 19, 1973, by Western Communications, Inc.; (b) comments, filed September 27, 1973, by the Chief, Broadcast Bureau; (c) an opposition, filed October 10, 1973, by Las Vegas Valley Broadcasting Co.; and (d) a motion to strike the comments of Las Vegas Valley Broadcasting Co., filed October 11, 1973, by Western Communications, Inc.

3. IT IS ORDERED, That the Request for Leave to File Supplement and Supplement to Application for Review of FCC 73R-233, filed September 19, 1973, by Western Communications, Inc., IS GRANTED, and Western's supplement IS ACCEPTED.

4. IT IS FURTHER ORDERED, That the Motion to Strike Late Filing, filed October 11, 1973, by Western Communications, Inc., IS

GRANTED, and the opposition filed October 10, 1973, by Las Vegas Valley Broadcasting Co. IS STRICKEN.

5. IT IS FURTHER ORDERED, That the Application for Review of FCC 73R-233, filed June 29, 1973, by Western Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-679

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of WESTERN UNION TELEGRAPH CO., TRANSMITTAL NOS. 6986 AND 6992, TARIFF FCC No. 261 AND REVISION TO TARIFF FCC No. 254 AND RCA GLOBAL COMMUNICATIONS, INC., TRANSMITTAL NOS. 3922, 3955, AND 3985, TARIFF FCC NOS. 93 AND 94 AND RCA ALASKA COMMUNICATIONS, INC., TRANSMITTAL No. 54 AND TARIFF FCC No. 1	Docket No. 20098

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1974; Released June 28, 1974)

BY THE COMMISSION:

1. The Commission has before it new Tariff F.C.C. No. 261 and revision to Tariff F.C.C. No. 254 filed on May 13, 1974 and revisions to F.C.C. No. 261 filed on May 24, 1974 of Western Union Telegraph Company (Western Union) and Tariff F.C.C. No. 93 filed on December 3, 1973, Tariff F.C.C. No. 94 filed on March 1, 1974, revisions to Tariff F.C.C. Nos. 93 and 94 filed on May 31, 1974 of RCA Global Communications, Inc. (RCA Globcom), Tariff F.C.C. No. 1 filed on January 14, 1974 by RCA Alaska Communications, Inc. all relating to the domestic communications satellite service.

2. RCA Globcom's Tariff F.C.C. No. 93 became effective on December 21, 1973; its Tariff F.C.C. No. 94 became effective March 4, 1974. RCA Alascom's Tariff F.C.C. No. 1 became effective on January 15, 1974. Globcom's revisions to Tariff F.C.C. Nos. 93 and 94 and Western Union's F.C.C. Tariff No. 261 and the revision to Tariff F.C.C. No. 261 are scheduled to become effective on July 1, 1974

3. Petitions for suspensions, imposition of accounting orders and for investigation have been filed as follows:

(a) On June 17, 1974 MCI Telecommunications Corporation, Microwave Communications Inc., MCI-New York West, Inc. and Interdata Communications, Inc. (hereinafter referred to collectively as MCI) as to Western Union's Tariff F.C.C. Nos. 261 and 254;

(b) On June 13, 1974 the Secretary of Defense in behalf of the Department of Defense (DOD) as to Western Union Tariff F.C.C. No. 261;

(c) On June 17, 1974, RCA Globcom as to Western Union Tariff F.C.C. No. 261;

(d) On June 17, 1974 American Satellite Corporation as to Western Union's Tariff F.C.C. No. 261.

4. We have carefully reviewed the proposed tariffs, the accompanying data filed pursuant to Section 61.38 of the rules, and the various petitions. On the basis of the foregoing, we have concluded that substantial questions exist whether the existing rates for domestic satellite service, and those proposed to become effective on July 1, 1974, included in the above described tariffs are in accord with the applicable statutory requirements set out in Sections 201–205 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 201–205. Accordingly, such tariffs will be set down for investigation and hearing. However, inasmuch as none of the rates to be investigated herein constitute "increased rates" Section 204 of the Act does not expressly provide for the imposition of an accounting order. Nor do we believe the tariffs should be suspended, in view of the fact that, while the tariffs raise basic and complex ratemaking issues, we are not persuaded that rates which are substantially below the existing rates for comparable service over terrestrial facilities present the kind of situation which warrants suspension. We will therefore permit new tariffs or tariff revisions scheduled to become effective on July 1, 1974 to go into effect on that date.[1] The RCA Alascom tariff is, of course, already in effect.

5. We will shortly issue a Memorandum Opinion and Order which sets forth in more detail the factual and legal premises on which we are acting, the issues to be considered in the hearing, and the procedure to be followed herein.

6. Accordingly, IT IS ORDERED, pursuant to Sections 201, 202, 204, 205 and 403 of the Communications Act of 1934, as amended, that an investigation is instituted as to the lawfulness of the above described tariffs on a date and on issues to be set forth in a later order.

7. IT IS FURTHER ORDERED, That Western Union, RCA Globcom and RCA Alascom are hereby made parties respondent to this proceeding.

8. IT IS FURTHER ORDERED, That except as otherwise indicated herein, the petitions described above are DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[1] By Transmittal Nos. 1 & 2 American Satellite Corporation filed Tariff F.C.C. No. 1 to become effective July 1, 1974. By Special Permission No. 73–88 issued June 25, 1974. ASC was granted special permission to postpone the effective date of its domestic satellite tariff to July 15, 1974. Upon the effective date of that tariff it will be automatically included in this Docket.